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Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE *et al.*,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether summary reversal is warranted in this "public figure" defamation action, challenging political advertisements run during the 1996 West Virginia gubernatorial campaign, when the West Virginia Supreme Court of Appeals ordered a plenary trial—

(1) Ignoring this Court's precedent, which required an independent review of the record on which the trial court concluded that there was no clear and convincing evidence of actual malice, and when

(2) The requisite independent review confirms the trial court's conclusion that there was nothing in the record to establish the constitutionally required clear and convincing evidence of actual malice.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the West Virginia Supreme Court: Charlotte Jean Pritt, the Republican National Committee, the National Republican Senatorial Committee, and the West Virginia State Victory Committee.*

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* The Republican National Committee has also filed a Petition for Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Respondent Charlotte Pritt, a former member of the West Virginia legislature, was the Democratic Party candidate in the 1996 West Virginia gubernatorial election, won by Republican Cecil Underwood. Alleging that Petitioners' advertisements—critical of her legislative voting record—caused her to lose the election, Respondent brought suit for defamation in West Virginia state court. The advertisements were based exclusively on Respondent's legislative voting record, and were created for Petitioners by a non-party to this lawsuit. Before sponsoring the advertisements, Petitioners confirmed their factual accuracy based on their own review of Respondent's legislative record. Concluding, *inter alia*, that "there is *no record evidence* that [Petitioners] acted with 'actual malice,'" Pet. App. 27a (emphasis added), the Circuit Court of Fayette County granted Petitioners' motion for summary judgment. Reversing, the West Virginia Supreme Court of Appeals ("West Virginia Supreme Court") perceived a "factual dispute" solely because "the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice." Pet. App. 15a.

On this basis alone, the West Virginia Supreme Court required that a jury decide whether political speech during a heated campaign should subject Petitioners to a sizeable money judgment. Jettisoning this Court's constitutionally-mandated screen for insubstantial defamation cases—*i.e.*, an independent search for clear and convincing evidence of actual malice—the West Virginia Supreme Court inevitably chilled the prospect for robust political campaign debate. Consequently, Petitioners respectfully request that a writ of certiorari issue and that the judgment of the West Virginia Supreme Court be summarily reversed.

This Court's precedents unambiguously impose on appellate courts a constitutional obligation to independently review the record to determine, as a matter of law, whether a public figure defamation plaintiff has presented clear and convincing evidence of actual malice. It is well settled in the federal Circuit Courts of Appeals that the rule of independent review applies in appeals from a grant of summary judgment. The West Virginia Supreme Court simply cast aside the constitutional rule of independent review, beginning and ending its "review of the record" with the observation—doubtlessly true in *all* public figure defamation cases—that the parties "repeatedly and continuously have argued the facts" regarding actual malice. The court, however, did not identify even a *single fact*, let alone clear and convincing evidence, from which a jury could find that Petitioners acted with actual malice.

The West Virginia Supreme Court's decision has far-reaching and constitutionally impermissible consequences for electoral candidates of all political parties, and for their supporters. The rule of independent review and the actual malice requirement are designed to give freedom of expression sufficient "breathing space" by diminishing "the pall of fear and timidity" created by the threat of a civil money judgment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 277-78 (1964). The West Virginia Supreme Court has choked off that breathing space by lowering—to the point of extinction—the constitutional hurdles of independent review, and the clear and convincing evidence standard. Because the West Virginia Supreme Court's decision cannot be squared with the precedents of this Court and the federal Circuit Courts of Appeals, summary reversal is warranted.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court (Pet. App. 1a-23a) is reported at 557 S.E.2d 853. The order

of the Circuit Court of Fayette County, West Virginia granting summary judgment to Petitioners (Pet. App. 24a-28a) is not reported.

JURISDICTION

The judgment of the West Virginia Supreme Court reversing the trial court's grant of summary judgment was entered on December 12, 2001, Pet. App. 1a, and therefore this petition is timely filed. Sup Ct. R. 13(1). This Court has jurisdiction over that judgment pursuant to 28 U.S.C. § 1257(a). Although the West Virginia Supreme Court remanded this case for further proceedings in the trial court (*i.e.*, a trial), the court's judgment is nevertheless "final" within the meaning of 28 U.S.C. § 1257(a). First, the West Virginia Supreme Court's decision is not subject to further review in the West Virginia courts. Second, because each of Respondent's causes of action[1] is based upon the very same advertisements as her defamation claim, the trial court ruled, and the West Virginia Supreme Court implicitly accepted, that each of the causes of action is subject to the actual malice requirement. *See, e.g.*, Pet. App. 17a-18a, 26a. Thus, correcting the West Virginia Supreme Court's erroneous application of the constitutional rules of independent review and proof of actual malice by clear and convincing evidence will terminate this action. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 612 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80, 485, 486-87 n.13 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

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[1] Respondent asserted causes of action for: defamation (Count I); violation of W. Va. Code § 3-8-11(c) (Count II), which imposes criminal penalties for publishing falsehoods about a candidate for public office; defamation *per se* (Count III); and, "false light" invasion of privacy (Count IV).

Moreover, review of the West Virginia Supreme Court's judgment is necessary to prevent a significant erosion of federal policy. *Cox Broadcasting*, 420 U.S. at 482-83. This case raises the important question of whether statements made in a campaign advertisement during a heated political campaign are entitled to First Amendment protection. It is axiomatic that speech during political campaigns is "an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976), and that "[a]djudicating the proper scope of First Amendment protections has often been recognized . . . as a 'federal policy' that merits an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend I. The First Amendment applies to the States through the Fourteenth Amendment, which provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

STATEMENT OF THE CASE

Respondent's Status as a Public Figure

Respondent necessarily conceded in the proceedings below that she is a "public figure" for purposes of this defamation action. *See* App. Br., at 19. Respondent had been in the West Virginia legislature for eight years and had campaigned in ten elections for public office, including a failed run for governor of West Virginia in 1992. *See* Am. Compl. ¶¶ 4-5; Pritt Depo., Vol. I, at 59-60.

The Allegedly Defamatory Campaign Advertisements

In 1996, Respondent received the Democratic nomination for Governor of West Virginia and faced Republican Cecil Underwood in the general election.[2] Respondent ran a series of negative advertisements against Underwood, accusing him of dodging the draft during World War II, voting against the creation of Medicare during his first term as Governor in 1960, and proposing a 20% reduction in the state police force. *See* Pritt Depo., Vol. I, at 273-81, 290-95, 307-08. According to Underwood, these allegations were false. *See* Underwood Depo., at 14-24.

Between October 24 and Election Day, Petitioners paid for and sponsored the following radio advertisement

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[2] The 1996 Democratic primary proved to be a bitter contest between Respondent and State Senator Joseph Manchin, with both candidates running negative campaign advertisements against the other. *See* Pritt Depo., Vol I, at 163; Pritt Depo., Vol. III, at 115. Respondent aired advertisements accusing Senator Manchin of accepting bribes, consorting with convicted felons, and brokering legislative deals for his own financial gain at the expense of West Virginia coal mining jobs. *See* Pritt Depo., Vol. I, at 163-64, 173-74, 195-96. For his part, Senator Manchin criticized Respondent's legislative voting record, including her proposal to teach sex education to six-year-olds; her vote against banning the sale of "X-rated" videos to children; her vote to allow drug abusers to work in the public schools; her vote against honoring West Virginia's Gulf War veterans; her vote to allow the burning of the American flag; and, her vote against requiring students to recite the Pledge of Allegiance at school. *See* Pritt Depo., Vol. I, at 229-34, 242-51. The advertisements at issue in this case are substantially the same as those sponsored by Senator Manchin. *See* pp. 20-27, *infra*. Respondent did not sue Senator Manchin, a fellow Democrat.

about Respondent's legislative voting record, seven aspects of which she challenged (as noted):[3]

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from. [1] In the State Senate, Charlotte Pritt proposed teaching first graders about condoms. Surprised? You shouldn't be. [2] Senator Pritt also voted to permit the sale of pornographic videos to children. [3] She even voted to allow convicted drug abusers to work in our public schools. [4] If parents can't trust Charlotte Pritt to protect our children, think also of our veterans. [5] Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War. [6] Senator Pritt voted to allow the burning of the American Flag that all veterans fought so hard to defend. [7] She even opposed requiring students to begin their day with the Pledge of Allegiance. Look behind the smile. Charlotte Pritt—wrong on the issues. Wrong for West Virginia.[4]

There was no dispute in the proceedings below that the statements made in the advertisement were based exclusively upon Respondent's recorded votes on specific bills and amendments introduced in the West Virginia legislature. *See* Welch Depo., at 26-27, 29-30, 40-41, 43-44, 46, 83, 87-88.

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[3] Petitioner NRSC formed the Victory Committee for the purpose of airing campaign advertisements in the 1996 West Virginia gubernatorial election. Petitioner Victory Committee paid for the advertisements with a loan from the NRSC.

[4] A similar television advertisement was aired during the same timeframe. Pet. App. 37a-38a.

Evidence Concerning Petitioners' Alleged Actual Malice

The original draft of the advertisements was created by David Welch, a non-party herein, and a media consultant to Petitioner Victory Committee. *See* Welch Depo., at 25-26, 28-30, 33-34. In drafting the advertisements, Mr. Welch researched and read certain State House and Senate bills and amendments on which Respondent voted. *See id.* at 26-27, 29-30, 40-41, 43-44, 46, 83, 87-88; *see* pp. 20-27, *infra*. Mr. Welch also consulted the Journal of the House of Delegates and the Journal of the Senate, a public record that reported Respondent's vote on the House and Senate bills and amendments. *Id.* Mr. Welch believed that the statements in the advertisement were "[a]bsolutely truthful" and presented a "fair and accurate portrayal of [Respondent's] voting record" on each one of the bills and amendments at issue. *Id.* at 50, 88.

However, as an independent consultant, Mr. Welch did not have the authority on behalf of Petitioners to approve the advertisements for publication. *See* Welch Depo., at 28-33. Instead, he was required to submit drafts of the proposed advertisement to Petitioners for their review and approval. *See id.* at 30-33, 88. Mr. Welch submitted "at least" two drafts of the advertisements to Craig M. Engle, the general counsel of Petitioner NRSC who was the only employee of Petitioners to offer evidence in this case. *See id.* at 32; Engle Aff. ¶ 1. On behalf of Petitioners, Mr. Engle independently reviewed the bills and amendments in support of the draft advertisement to verify that the statements were truthful and accurate. *See* Engle Aff. ¶¶ 1-4(a)-(f). Having completed his independent review, Mr. Engle was satisfied that the advertisements "truthfully portrayed" both the legislation at issue and Respondent's vote on that legislation. *See* Engle Aff. ¶¶ 3, 5. Mr. Engle thereafter approved the advertisement for publication on behalf of Petitioners. *See* Engle Aff. ¶¶ 5-6; Welch Depo., at 33.

Against this record evidence, Respondent nonetheless contended that Petitioners had acted with actual malice. Respondent, however, did not present any evidence that Mr. Welch was aware of any fact that would have put him on notice that the statements in the advertisements were in any way inaccurate or false. Although Mr. Engle was the employee of Petitioners with responsibility for approving the advertisements for publication, Respondent did not take his deposition. Consequently, Respondent presented no evidence contradicting Mr. Engle's affidavit testimony concerning his review of the record, which led to his belief that the advertisements made "truthful and accurate" statements about Respondent's legislative voting record. *See* Engle Aff. ¶¶ 1-5.

Proceedings Below

On October 31, 1997, Respondent filed her original complaint in West Virginia state court, and an amended complaint approximately one year later. In the Amended Complaint, Ms. Pritt alleged, *inter alia*, that the seven statements in the radio advertisement—three of which also appeared in a television advertisement—were defamatory. Respondent sought $2 million in compensatory damages and $10 million in punitive damages. The parties conducted discovery, and Petitioners thereafter moved for summary judgment, arguing that (1) the statements were true, and (2) even if false, there was no clear and convincing evidence that Petitioners made the statements with actual malice. Respondent did not dispute that she was a public figure when the allegedly defamatory statements were made, or that she was required to prove actual malice by clear and convincing evidence.

The Circuit Court of Fayette County granted summary judgment in favor of Petitioners, holding, *inter alia*, that Respondent had not presented clear and convincing evidence that Petitioners acted with actual malice. Pet. App.

26a-28a. Based on its independent review of the evidence, the trial court concluded that:

> [T]here is *no record evidence* that [Petitioners] acted with 'actual malice.' Plaintiff contends that David Welch, who created the advertisements but is not a defendant, 'should have known' the statements at issue were false. What Mr. Welch 'should have known' is irrelevant because negligence does not satisfy plaintiff's burden of proof. *Masson v. The New Yorker Magazine*, 501 U.S. 496, 510 (1991). Further, Mr. Welch testified at his deposition that he reviewed the legislative record and believed the advertisements were 'absolutely truthful.' Craig Engle, General Counsel of defendant National Republican Senatorial Committee, also stated in an Affidavit that he studied the advertisements, compared their statements with [Respondent's] votes, and approved them for publication only after he was satisfied that they were true. There is no genuine issue of material fact concerning 'actual malice.'

Pet App. 27a-28a (emphasis added). The trial court denied Respondent's motion for reconsideration. Pet. App. 29a.

The West Virginia Supreme Court reversed.[5] The sum and substance of the court's reasoning was as follows:

> [U]pon a review of the record . . . we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury. Unlike the circuit court, we are not firmly convinced that the factual issues herein have been

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[5] Respondent's amended petition to appeal was granted on April 3, 2001. Pet. App. 30a.

> finally resolved. *Specifically, before this Court, the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice.* When faced with such an *ongoing factual dispute*, and inferences that, if viewed in the nonmovant's favor [footnote], could support a verdict for the nonmovant, we must not continue to harbor these doubts as to whether summary judgment is appropriate but rather hand the case over to the jury, in whose province such factual determinations lie.

Pet. App. 15a (emphasis added). In stark contrast to the trial court's analysis, the West Virginia Supreme Court did not independently review the record and determine for itself whether Respondent had presented facts which, if true, constituted clear and convincing evidence of actual malice.[6] Indeed, the court did not identify a *single fact* from which a jury could find that Petitioners had acted with actual malice. The court did not mention Mr. Welch or Mr. Engle, discuss their testimony, or state the facts of which Mr. Welch and Mr. Engle were aware that could permit a jury to find, by clear and convincing evidence, that they acted with actual malice. The West Virginia Supreme Court simply summarily concluded that Respondent had met her summary judgment

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[6] In a concurring opinion, Justices Albright and Starcher reasoned that Respondent may prevail on a mere showing of negligence, Pet. App. 22a, a result that is inconsistent with well-settled precedents of this Court. *See* p. 19, *infra*.

burden because of the parties' "dispute" over "facts" that the court never identified. Pet. App. 15a, 20a-21a n.14.[7]

REASONS FOR ISSUING THE WRIT

A writ of certiorari should issue because the West Virginia Supreme Court bypassed two constitutional requirements in public figure defamation cases.

First, as this Court has consistently held, in public figure defamation cases, courts have a constitutional obligation to independently review the entire record to ensure that civil liability does not intrude "on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). This rule of "federal constitutional law" requires appellate courts to "make a fresh examination of crucial facts," especially in defamation cases premised on statements made during a political campaign. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686-87 (1989). Every federal Circuit Court of Appeals to address the question has concluded that the rule of independent review applies to appeals from a grant of summary judgment. The West Virginia Supreme Court ignored these precedents in failing to conduct an independent review of Respondent's "proof" that Petitioners acted with actual malice when they approved the advertisements for publication.

Second, this Court has consistently held that, under the First Amendment, a public figure cannot prevail in a

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[7] Three of the five Justices on the West Virginia Supreme Court campaigned with Respondent at the time that the advertisements at issue were aired on radio and television. Only one of the three recused, and he did so the day before oral argument. Pet. App. 32a-36a.

defamation action without proof by "clear and convincing evidence" that a defendant acted with "actual malice"—*i.e.*, publishing statements with knowledge that they were false, or with a reckless disregard for their truth or falsity. *New York Times Co.*, 376 U.S. at 279-80, 285-86. Eviscerating the clear and convincing evidence standard, the West Virginia Supreme Court handed the case to a jury simply because the parties disagreed over the facts, although the court did not identify the ostensibly relevant and disputed facts. An independent review of the record, however, confirms that a jury could not find actual malice by clear and convincing evidence. Respondent presented *no* evidence that Petitioners harbored any doubts about, or were aware of any fact that undermined, the truthfulness of the statements critical of Respondent's legislative voting record.

The rule of independent review and the requirement that public figure defamation plaintiffs prove actual malice by clear and convincing evidence are rules of federal constitutional law, and cannot be undermined by state-law summary judgment standards. Accordingly, review of the West Virginia Supreme Court's decision is warranted because that court "decided an important federal question that conflicts with relevant decisions of this Court," SUP. CT. R. 10(c), and "decided an important federal question in a way that conflicts with the decision of . . . a United States Court of Appeals." SUP. CT. R. 10(b).

However, briefing and argument on the merits are unnecessary. Because the West Virginia Supreme Court's decision is a "demonstrably erroneous application of federal law," summary reversal is appropriate. *See* SUP. CT. R. 16(1); *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (*per curiam*). Indeed, the hollowness of the West Virginia Supreme Court's discussion of the supposed factual dispute over actual malice makes this the prototypical case for summary reversal. *Major League Baseball Players Ass'n v.*

Garvey, 532 U.S. 504, 510 (2001) (*per curiam*) (summary reversal warranted where court "recited" the correct legal principles, "but its application of them [was] nothing short of baffling").

I. THE WEST VIRGINIA SUPREME COURT ABDICATED ITS CONSTITUTIONAL OBLIGATION TO REVIEW THE APPELLATE RECORD FOR CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE.

Beginning with *New York Times*, this Court has said that its "duty is not limited to the elaboration of constitutional principles," but also imposes an obligation to "review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co.*, 376 U.S. at 285. Public figures suing for defamation must prove by "clear and convincing evidence" that the alleged defamatory statements were "made with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Id.* at 279-80, 285-86. Courts "must 'make an *independent* examination of the whole record,' [citation], so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285 (emphasis added); *Bose Corp.*, 466 U.S. at 510-11.[8]

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[8] *Accord Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513-21 (1991); *Harte-Hanks*, 491 U.S. at 685-86; *Bose Corp.*, 466 U.S. at 499-511; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54-55 (1971) (*plurality opinion*); *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (*per curiam*); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-59 (1967) (*plurality opinion*).

When a lower court such as the one below intentionally ignores that obligation, error correction in the form of summary reversal from this Court is appropriate. This Court has held that the rule of independent review requires "enhanced appellate review," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), and "'is a rule of federal constitutional law.'" *Hurley*, 515 U.S. at 567 (*quoting Bose Corp.*, 466 U.S. at 510). Thus, "[t]he question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice *is a question of law*." *Harte-Hanks*, 491 U.S. at 685 (emphasis added); *accord Bose Corp.*, 466 U.S. at 510-11.

In defamation actions arising out of political campaigns, the rule of independent review assumes an even more critical role in preserving the "robust" and "wide-open" debate contemplated by the First Amendment. "'Discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established by our Constitution.'" *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)). Indeed, the First Amendment "has its *fullest and most urgent application* precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (emphasis added). "When a candidate enters the political arena, he or she 'must expect that the debate will sometimes be rough and personal.'" *Harte-Hanks*, 491 U.S. at 687 (*quoting Ollman v. Evans*, 752 F.2d 970, 1002 (D.C. Cir. 1984) (*en banc*) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985)).

"There is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the *strongest possible case* for application of the *New York Times* [actual malice] rule,' [citation], and the *strongest possible case for independent review*." *Harte-*

Hanks, 491 U.S. at 686-87 (emphasis added); *accord Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971). As this Court has recognized, "[t]he clash of reputations is the staple of election campaigns" because

> [t]he principal activity of a candidate in our political system . . . consists in putting before the voters every conceivable aspect of [her] public and private life that [s]he thinks may lead the electorate to gain a good impression of [her]. A candidate who, for example, seeks to further her cause through the prominent display of [her husband] and children can hardly argue that [her] qualities as a [wife] or [mother] remain of 'purely private' concern. And the candidate who vaunts [her] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent . . . attempts to demonstrate the contrary.

Monitor Patriot, 401 U.S. at 274-75.

For these reasons, it is at this hour too late in the development of free political speech jurisprudence for a lower court to effectively call into question this Court's decision that "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Bose Corp.*, 466 U.S. at 511. All of the federal Circuit Courts of Appeals are also in agreement in following the clear indications from this Court that "[a]s an appellate court reviewing an order granting summary judgment, we must independently review the record to determine whether [the plaintiff] has forecast evidence sufficient to prove actual malice by clear and convincing evidence." *Carr v. Forbes, Inc.*, 259 F.3d 273,

282 (4th Cir. 2001) (*citing Bose Corp.*, 466 U.S. at 514).[9] In reviewing a grant of summary judgment in public figure defamation cases, an appellate court must satisfy itself that "the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986); *see also Carr*, 259 F.3d at 282-83; *Dunn*, 193 F.3d at 1197-98; *Dunn*, 833 F.2d at 450.

Here, the West Virginia Supreme Court failed even to acknowledge that it had a constitutional obligation to independently review the record and determine *for itself*, and as a matter of law, whether Respondent had presented clear and convincing evidence of actual malice. Instead, the court was satisfied that Respondent had presented such evidence simply because "the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were . . . laced with

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[9] *Accord Desnick v. American Broadcasting Cos.*, 233 F.3d 514, 517-20 (7th Cir. 2000); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1197-1200 (11th Cir. 1999); *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1062-64 (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 410-12 (6th Cir. 1991); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1434 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 450 (3d Cir. 1987); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); *see also American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir.) (independently reviewing record on grant of summary judgment in First Amendment case), *cert. denied*, 531 U.S. 811 (2000).

malice." Pet. App. 15a. The West Virginia Supreme Court "hand[ed] the case over to a jury" based solely on *the parties' disagreement* about the absence of actual malice, rather than on *the court's independent determination* that specified evidence in the record allowed a jury to find actual malice by clear and convincing evidence. Such an abdication is simply contrary to the legion of precedents from this Court and other federal courts.

The West Virginia Supreme Court's bland assurance that it had "review[ed] . . . the record," Pet. App. 15a, does not satisfy the constitutional obligation of independent review. Acceptance of such passing statements would deprive the rule of its intended purpose—to ensure that "the evidence in the record is sufficient to cross the constitutional threshold [of] clear and convincing proof of 'actual malice.'" *Bose Corp.*, 466 U.S. at 511. Thus, the rule of independent review "oblige[s]" courts "to make a *fresh examination of crucial facts*." *Hurley*, 515 U.S. at 567 (emphasis added). In case after case, this Court has applied the rule of independent review by examining the evidence and determining anew whether actual malice can be established with convincing clarity.[10] In public figure defamation cases on appeal from a grant of summary judgment, the federal Circuit Courts of Appeals have applied the rule of independent review in precisely the same way.[11]

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10 *See, e.g.*, *Masson*, 501 U.S. at 513-21; *Harte-Hanks*, 491 U.S. at 689-93; *Bose Corp.*, 466 U.S. at 511-14; *Rosenbloom*, 403 U.S. at 55-57; *Time, Inc.*, 401 U.S. at 284-92; *Greenbelt*, 398 U.S. at 11-14; *Beckley*, 389 U.S. at 82-85; *Curtis*, 388 U.S. at 156-59; *New York Times Co.*, 376 U.S. at 285-88.

11 *See Carr*, 259 F.3d at 282-83; *Desnick*, 233 F.3d at 517-20; *Gray*, 221 F.3d at 248, 251-52; *Dunn*, 193 F.3d at 1197-1200; *Dodds*, 145 F.3d at 1061-64; *Perk*, 931 F.2d at 410-12; *Price*, 881 F.2d at 1434-

(continued...)

The West Virginia Supreme Court did not discuss *any* of the facts ostensibly comprising the "factual dispute" that authorized a jury to find actual malice by clear and convincing evidence. Pet. App. 15a, 20a-21a n.14. Although the court acknowledged that Respondent was subject to a "stricter standard of evidence" at the summary judgment stage in a public figure defamation action, *id.* (*citing Anderson*, 477 U.S. 242, *Crain v. Lightner*, 364 S.E.2d 778, 782 n.1 (W. Va. 1987), and *Long v. Egnor*, 346 S.E.2d 778, 785-86 (W. Va. 1986)), the court did not identify even a *single fact* proffered by Respondent that satisfied this "stricter standard of evidence."[12] Thus, the West Virginia Supreme Court's purported "review of the record" pays nothing more than lip service to the constitutional command to conduct a "fresh examination of crucial facts." *Hurley*, 515 U.S. at 567.

II. AN INDEPENDENT REVIEW OF THE RECORD CONFIRMS THAT THERE IS *NO* EVIDENCE—LET ALONE CLEAR AND CONVINCING EVIDENCE—FROM WHICH A JURY COULD FIND THAT PETITIONERS ACTED WITH ACTUAL MALICE.

The West Virginia Supreme Court's failure to independently review the record was not harmless error. An independent review only confirms the trial court's conclusion that "there is *no record evidence* that [Petitioners] acted with

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46; *Liberty Lobby, Inc.*, 852 F.2d at 598-601; *Dunn*, 833 F.2d at 450-55; *Zerangue*, 814 F.2d at 1071-72; *Herbert*, 781 F.2d at 308-11.

[12] Instead, the West Virginia Supreme Court offered mysterious references to unexplained "deposition testimony" and the trial court's ostensible decision to "discredit the evidence offered by [Respondent] to demonstrate the existence of a genuine issue of material fact." Pet. App. 16a n.10.

'actual malice.'" Pet. App. 27a (emphasis added). The demanding actual malice standard requires clear and convincing proof that Petitioners either knew that the advertisements were false, or that they acted with reckless disregard for the truth of those statements. *See New York Times Co.*, 376 U.S. at 279-80, 285-86; *Bose Corp.*, 466 U.S. at 512. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." *Harte-Hanks*, 491 U.S. at 688; *accord Masson*, 501 U.S. at 510. Instead, "[t]he standard is a *subjective one*—there must be sufficient evidence to permit the conclusion that the defendant *actually had a 'high degree of awareness of . . . probable falsity*'" or "'*in fact entertained serious doubts as to the truth of his publication.*'" *Harte-Hanks*, 491 U.S. at 688 (emphasis added) (*quoting St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) and *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

A. Respondent Presented *No* Evidence That Mr. Welch Acted With Actual Malice.

Respondent's effort to establish actual malice focused almost exclusively on the state of mind of Mr. Welch, the creator of the original draft of the advertisements. Mr. Welch testified that he believed the advertisements were "absolutely truthful" and that "[t]he objective of the ads was to convey to the voters of West Virginia accurate and truthful information about [Respondent's] public voting record." Welch Depo., at 36, 50, 88. The uncontested record evidence confirms the factual basis for Mr. Welch's testimony that he believed the statements in the advertisements were "absolutely truthful."[13]

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[13] As to each of the statements in the advertisement, Respondent argued that Petitioners acted with actual malice because then-candidate Underwood publicly stated that he objected to the "tone" of the advertisements and asked that the advertisements be withdrawn. *See* App. Br. at 25; Underwood Depo., at 10-11, 20. Underwood's testimony (continued...)

1. "In the State Senate, Charlotte Pritt proposed teaching first graders about condoms."

On March 20, 1989, Respondent sponsored Senate Bill 531 ("SB 531"), which provided:

> [T]he state board of education *shall* cause to be taught *in all of the public schools of this state the subject of human growth and development, including* the social aspects, *contraception*, diseases and all other special instruction deemed appropriate and necessary by the state board. The state board shall determine the necessary time of instruction of human growth and development which *shall be provided to grades kindergarten through twelve.*

W. VA. SENATE BILL 531, COMM. PRINT 89R1025 (Mar. 20, 1989) (emphasis added). Respondent argued that because the word "condoms" does not appear in SB 531, the statement that Respondent voted to "teach first graders about condoms" was "literally false" and a "fabrication." App. Br. at 23-31.

However, Mr. Welch testified that he believed that the statement, "Charlotte Pritt proposed teaching first graders

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does not suggest that Petitioners acted with actual malice. Respondent presented *no* evidence that Underwood ever informed Petitioners that the advertisements were false, or asked that the advertisements be withdrawn because they were false. In fact, it was undisputed that Underwood played no role whatsoever in the preparation of the advertisements, did not even know that Petitioner Victory Committee existed, and did not personally review Respondent's legislative voting record. *See* Underwood Depo., at 8, 20. Nor did Respondent present any evidence that Underwood provided Petitioners with any facts that would have put them on notice that any statements in the advertisements were ever ostensibly false.

about condoms," was a "fair interpretation" of SB 531 because condoms are a common form of contraception. *See* Welch Depo., at 39-40; *see* THE OXFORD DICTIONARY AND THESAURUS 291 (Am. ed. 1996) (defining "condom" as a "contraceptive"). A "reasonable" statement made in "good faith" establishes, as a matter of law, that the statement was not made with actual malice. *New York Times Co.*, 376 U.S. at 286; *see also Dunn*, 193 F.3d at 1197. Respondent offered no evidence that Mr. Welch's belief that condoms are a common form of contraception was held in bad faith.

Respondent's own interpretation of SB 531 simply confirms that Mr. Welch's interpretation of that bill was one of several reasonable interpretations. Respondent testified that it would be a "true" statement to say that SB 531 provided "*sex education* for children as young as first grade." Pritt Depo., Vol. I, at 231 (emphasis added). Respondent also agreed that the "State Board of Education would have had total authority to make the decision of whether to teach *contraception* at *any school level*." Pritt Depo., Vol. II, at 138 (emphasis added). Thus, Respondent's suggestion that she favors "sex education" for first graders, which includes instruction on "contraception" but not on condoms, is not materially different than Mr. Welch's interpretation that teaching first graders about contraception would include a discussion of condoms. *See Bose Corp.*, 466 U.S. at 512 (no actual malice where statement is "'one of a number of possible rational interpretations'" (*quoting Time, Inc.*, 401 U.S. at 290)).

2. "Senator Pritt also voted to permit the sale of pornographic videos to children."

On February 15, 1990, Respondent voted against an amendment to Senate Bill 184 ("SB 184"). *See* Pritt Depo., Vol. III, at 21. The amendment provided that:

> No business entity in this state shall offer for sale or rent or sell or rent to a person who is less than eighteen years of age, or permit a person who is less than eighteen years of age to view on the entity's premises, a video movie which is rated 'X' or which is not rated.

W. VA. J. OF THE SENATE 481-82 (Feb. 15, 1990). Respondent testified in her deposition that it is a false statement to say that she voted to permit selling pornographic videos to children because she did not "inten[d]" that result and because she believed that West Virginia law already prohibited the sale of pornographic videos to children. *See* Pritt Depo., Vol. III, at 19-20, 23, 29, 36; App. Br. at 24. However, Respondent presented no evidence suggesting that Mr. Welch was aware of Respondent's subjective intent when she voted on the amendment to SB 184 or was aware of any alleged West Virginia law that prohibited the sale of "X" rated videos to minors.

3. "She even voted to allow convicted drug abusers to work in our public schools."

On March 10, 1988, Respondent voted against an amendment to Senate Bill 639 ("SB 639"), which provided:

> [N]o person who has been convicted of a charge of possession, use or distribution of any illegal or controlled substance will be hired either by the state superintendent of schools or any county superintendent of schools for any administrative, professional or service personnel position.

W. VA. J. HOUSE OF DELEGATES 1624-25 (Mar. 10, 1988). Here, too, Respondent focused on her unannounced intent—ostensibly not to allow drug abusers to work in the public schools—and her belief that existing West Virginia law prohibited schools from hiring persons convicted of drug possession, use, or distribution. *See* Pritt Depo., Vol. II, at

146-49; App. Br. at 24. However, there was no evidence suggesting that Mr. Welch was aware either of Respondent's undisclosed state of mind in voting against the amendment to SB 639, or of other statutory provisions that Respondent allegedly considered in casting her vote.

4. "If parents can't trust Charlotte Pritt to protect our children, think also of our veterans."

Respondent argued that Mr. Welch drafted this statement with actual malice because she "had the reputation of being one of the foremost advocates for the protection of children when she was in the legislature." App. Br. at 24-25. However, Respondent presented no evidence that Mr. Welch was aware of Respondent's "reputation" in the West Virginia legislature.

Nor did Respondent present any evidence contradicting Mr. Welch's proffered basis for this statement in the radio advertisement. Mr. Welch lived and worked in West Virginia. *See* Welch Depo., at 73, 78. It was undisputed that, at the time that he drafted the radio advertisement, Mr. Welch had a child in the first grade. *Id.* at 40. Based solely on his status as a parent of a first grader, Mr. Welch believed that Respondent's voting record on teaching first graders about condoms, allowing children to purchase pornographic videos, and allowing drug abusers to work in public schools made her unfit to be governor of West Virginia. *Id.* at 40, 44-45; *see also id.* at 40 ("I would say that that's not the kind of voting record that I would want for someone to be the chief executive of the State that I live in."); *id.* ("So, as a parent and thinking about all of the parents in West Virginia, I certainly think that saying, ['']Parents can't trust Charlotte Pritt,['] [was] based upon her voting record on these particular pieces of legislation."). Because Mr. Welch based his opinion on disclosed facts, as a

matter of law, the statement could not have been made with actual malice.

5. "Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War."

A few days after the Gulf War began, the West Virginia State Senate adopted Concurrent Resolution 4 ("CR 4"). *See* W. VA. J. OF THE SENATE 150-51 (Jan. 24, 1991). That resolution offered the support of both Houses of the West Virginia legislature for the Gulf War and for West Virginia servicemen and women serving in the Gulf. The resolution in part provided:

> *Further Resolved*, That the West Virginia Legislature supports and so *honors all West Virginians serving America in Operating Desert Storm* including those West Virginia National Guard and Reserve Units activated for Operation Desert Storm. [¶] West Virginia's sons and daughters have a long and distinguished tradition of serving their country in times of military need, with traditionally one of the highest per capita rates of military service in the nation.

Id. (emphasis added). Respondent was one of only two Senators to vote against CR 4. *Id.*; Pritt Depo., Vol. III, at 86-89, 93. Mr. Welch therefore believed that the statement that Respondent voted against "honoring" the West Virginians who fought in the Gulf War was true.

Respondent argued that Mr. Welch acted with actual malice because he did not examine Respondent's entire voting record on "honoring" Gulf War veterans. App. Br. at 13; Welch Depo., at 47-50. Respondent stated that Welch ignored her vote to "honor" West Virginia servicemen and women who had served in the Gulf War by paying them a state-sponsored "bonus." App. Br., at 26. However,

Respondent presented no evidence that Mr. Welch misstated Respondent's voting record.[14] To the contrary, Mr. Welch testified that a "[v]oting record is the recorded votes that are public information [and] that are documented in the official legislative files with the West Virginia Legislature." Welch Depo., at 48. In Mr. Welch's view, "if you voted six times on something, one time is still part of your voting record. . . . A voting record is a voting record is a voting record. . . . [A] legislator must be held accountable for all of [her] votes" *Id.* at 48, 49, 50. Respondent presented no evidence that Mr. Welch did not in good faith draw this portion of the advertisement from his analysis of Respondent's vote on CR 4.

Ultimately, Respondent simply thought it was unfair to present her vote on CR 4 as evidence of her position on the issue of honoring Gulf War veterans. Discussion of voting records and their significance is a core part of electoral debate. Disagreement on the significance of a truthfully described legislative vote cannot support a jury finding of actual malice by clear and convincing evidence. *See Monitor Patriot*, 401 U.S. at 275 ("A community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it."); *St. Amant*, 390 U.S. at 731, 733 (failure to investigate insufficient evidence of actual malice).

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[14] In fact, Respondent herself conceded that she did not expect the statement in the advertisement to be qualified by the statement, "But [Respondent] voted for a bonus for West Virginia veterans after hostilities had ceased." Pritt Depo., Vol. III, at 117.

6. "Senator Pritt voted to allow the burning of the American Flag that all veterans fought so hard to defend."

On March 8, 1991, the West Virginia Senate adopted Senate Resolution 31 ("SR 31"), which "urged" the United States Congress to "propose and adopt an amendment to the Constitution of the United States preserving and protecting the flag of the United States from desecration." W. VA. J. OF THE SENATE 3 (Mar. 8, 1991). Because Respondent voted against SR 31, *see* Pritt Depo., Vol. III, at 96, Mr. Welch believed that this statement in the advertisement was true.

Here, again, Respondent referenced her alleged undisclosed intent not to "allow the burning of the American flag" because flag-burning is constitutionally protected speech and, therefore, there was no need to "open a new area of law." Pritt Depo., Vol. I, at 231-32; Pritt Depo., Vol. III, at 90-91, 94. Respondent offered no evidence suggesting that Mr. Welch was aware of Respondent's alleged subjective "intent" with respect to SR 31. Regardless, Respondent herself testified that it "would be accurate" to state that "Senator Pritt voted to preserve the right of Americans to burn the American flag." Pritt Depo., Vol. III, at 94. There simply is no intelligible difference between Respondent's statement that she "voted to preserve the right of Americans to burn the American flag," and Mr. Welch's statement that Respondent "voted to allow the burning of the American Flag." Thus, because the indisputably true statement is virtually identical to the allegedly false statement, Mr. Welch could not have acted with actual malice when he drafted the statement in the advertisement.

7. "She even opposed requiring students to begin their day with the Pledge of Allegiance."

On February 11, 1986, the West Virginia House of Delegates adopted House of Delegates Bill 1193 ("HB 1193"), which required "the pledge of allegiance to the United States flag in public schools at the start of every instructional day," and also required that "certain students be exempt therefrom." W. VA. J. HOUSE OF DELEGATES 545-46, 638, 665-67 (Feb. 11, 1986). Because Respondent voted against HB 1193, *id.*, Mr. Welch believed that this statement was true. In arguing the existence of actual malice, Respondent contended that she did not oppose reciting the Pledge of Allegiance *per se*, but instead voted against the bill because it exempted students but not teachers. *See* Pritt Depo., Vol. III, at 110-11. Respondent, however, presented no evidence that Mr. Welch was aware of the reasons why Respondent claims she voted against HB 1193.

B. Respondent Presented *No* Evidence That Mr. Engle Acted With Actual Malice.

Focusing solely on Mr. Welch, Respondent did not contradict the evidence of Mr. Engle, the general counsel of Petitioner NRSC, concerning the process by which he verified and approved the advertisements. It is well settled, however, that "the state of mind required for actual malice [has] to be brought home to the persons *in the [Petitioners'] organization having responsibility for the publication of the advertisement.*" *New York Times Co.*, 376 U.S. at 287 (emphasis added).[15] It is undisputed that only Mr. Engle—

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[15] *Accord Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Holbrook v. Harman Automotive, Inc.*, 58 F.3d 222, 225 (6th Cir. 1995); *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 477 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988); *Flotech, Inc. v. E.I. Du Pont de Nemours &* (continued...)

and not Mr. Welch—had the responsibility and authority to approve the advertisements for publication on behalf of Petitioners. Engle Aff. ¶ 5.[16] Mr. Welch submitted to Mr. Engle only initial drafts of those advertisements. *See* Welch Depo., at 30-33; Engle Aff. ¶ 1.

Mr. Engle testified: (1) the NRSC had a "policy" of "pre-publication review[] of all advertisements," Engle Aff. ¶ 2; (2) the reviews are intended to "verify and ensure the truthfulness and accuracy" of the advertisements, *Id.*; (3) the Office of General Counsel for the NRSC "conducted a review of the advertisements at issue ... several days before their initial publication date," *Id.*, ¶ 3; (4) he "was personally involved in verifying the truthfulness and factual accuracy of the[] advertisements on behalf of the NRSC and the Victory Committee," *Id.*; (5) he "compared the advertisements' discussion of [Respondent's] voting record as a West Virginia state legislator with her actual votes on the supporting legislation," *Id.*, ¶ 4; (6) he reviewed Respondent's votes on various House and Senate bills that were the basis for the statements in the advertisements, *Id.*, ¶¶ 4(a)-4(f); *see* pp. 20-27, *supra*; (7) he "read each piece of supporting legislation and bill summaries, and confirmed [Respondent's] votes, as they were recorded in the journals of the West Virginia House of Delegates and State Senate," *Id.*, ¶ 4; (8) he concluded that the "statements contained in the advertisements truthfully portrayed the legislation on which [Respondent] voted and her actual votes" and he approved them because they were "truthful and accurate,"

Co., 814 F.2d 775, 781 (1st Cir. 1987); *Waskow v. Associated Press*, 462 F.2d 1173, 1175 n.4 (D.C. Cir. 1972).

[16] Respondent did not identify any other person affiliated with Petitioners that had the authority to approve the advertisements and that would testify in these proceedings.

Id., ¶ 5; and, (9) he would not have approved the advertisements if he believed them to be "untrue or inaccurate." *Id.*, ¶ 6.

Mr. Welch corroborated this evidence, testifying that Mr. Engle was "adamant" and "very exacting about the veracity of the ads, and . . . intent upon making sure that [the ads] were truthful . . . ." Welch Depo., at 30, 33, 88; *see also id.* at 32 ("I just remember that there was just an absolute commitment to making sure that the information and the content of the ads were truthful."). For her part, however, Respondent neither took Mr. Engle's deposition nor proffered evidence from any other witness to show that Petitioners otherwise acted with actual malice.

C. Summary Reversal is Required to Preserve the Robust and Wide Open Speech that is Essential in Political Campaigns.

If not corrected, the West Virginia Supreme Court's decision hands candidates for public office a potent, post-election weapon to strike back at political opponents and their supporters: a defamation lawsuit. By ignoring the constitutional mandate of independent review, the West Virginia Supreme Court's decision impermissibly chills speech in what is perhaps the most important public debate in a democratic society—whether a candidate seeking public office is fit to govern. In the State of West Virginia, candidates and their supporters who criticize an opponent's legislative voting record now will do so upon pain of years of litigation and the prospect of a multi-million dollar jury verdict. No result could be more inconsistent with this Court's long-standing precedent that the First Amendment cannot survive when

> would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact

> true, because of doubt whether it can be proved in court or the fear of expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' [Citation]. The rule thus dampens the vigor and limits the variety of public debate.

New York Times Co., 376 U.S. at 279; *accord Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772-73 (1986); *Time, Inc.*, 401 U.S. at 290.

The invitation to sue one's political opponents and their supporters is made more attractive still if a public figure defamation case can be handed over to a jury based solely on the parties' disagreement about the facts—rather than the constitutionally required clear and convincing proof of actual malice. Pet. App. 15a. The West Virginia Supreme Court has permitted future candidates to sue on *any* campaign advertisement, so long as the plaintiff makes the self-serving assertion—as Respondent has done here—that the advertisement did not capture the undisclosed subjective "intent" behind the candidate's voting record. *See* pp. 20-27, *supra*. Dangerously, the West Virginia Supreme Court would place into the hands of a local jury—rather than the voters of a State—the ultimate decision of whether a candidate's legislative voting record makes that person fit for public office.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue summarily reversing the judgment of the West Virginia Supreme Court.

Respectfully submitted,

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March 8, 2002

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APPENDIX A

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

September 2001 Term

No. 29326

CHARLOTTE PRITT,
Plaintiff Below, Appellant,

v.

THE REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Defendants Below, Appellees.

Appeal from the Circuit Court of Fayette County
Honorable Charles M. Vickers, Judge
Civil Action No. 97-C-380(V)

REVERSED AND REMANDED

Submitted: October 3, 2001
Filed: December 12, 2001

JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE MAYNARD, deeming himself disqualified, did not participate in the decision of this case.

JUDGE MADDEN, sitting by temporary assignment.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. "When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b)." Syllabus point 2, *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996).

3. "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus point 1, *Wickland v. American Travellers Life Insurance Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998).

4. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)." Syllabus point 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

5. "Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. *Syl. Pt. 5, Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995)." Syllabus point 2, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997).

6. "A candidate for political office is governed by the same rules with regard to recovery for libel as a public official and can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syllabus point 1, *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975).

7. "In order for a public official or a candidate for public office to recover in a libel action, the plaintiff must prove that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false." Syllabus point 1, *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992).

8. "A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syllabus point 6, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986).

9. "A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection." Syllabus point 4, *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293 (1994).

10. "[W]hether a statement is one of fact or opinion is an issue that must be decided initially by a court." Syllabus point 7, in part, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986).

11. "Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not." Syllabus point 2, in part, *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548 (1996).

12. In order for a public official or a candidate for public office to recover in a libel action, he/she must prove by clear and convincing evidence that the stated or implied facts were false.

DAVIS, Justice.

The appellant herein and plaintiff below, Charlotte Pritt [hereinafter referred to as "Ms. Pritt"], appeals from orders entered May 15, 2000, and June 13, 2000, by the Circuit Court of Fayette County. In the first order, the circuit court granted summary judgment for the appellees herein and defendants below, the Republican National Committee, *et al.*

[hereinafter collectively referred to as "RNC"],[1] concluding that statements made in advertisements sponsored by RNC during the 1996 West Virginia Gubernatorial race were not false or published with actual malice as alleged by Ms. Pritt. The circuit court's second order denied Ms. Pritt's "motion for reconsideration." On appeal to this Court, Ms. Pritt assigns numerous errors, including (1) summary judgment was not proper because there existed a genuine issue of material fact; (2) the circuit court failed to determine whether the statements in issue were defamatory; (3) deposition testimony was erroneously excluded; and (4) in rendering its decision, the circuit court neglected to address the remaining counts asserted in her amended complaint. Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we agree with Ms. Pritt that genuine issues of material fact do preclude the disposition of this matter by summary judgment. Accordingly, we reverse the circuit court's ruling to the contrary, and remand this case for further proceedings consistent with this Opinion.

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[1] In her complaint, Ms. Pritt named multiple defendants: the National Republican Senatorial Committee, the West Virginia State Victory Committee, John Doe, Jane Doe, and the appellee named herein, the National Republican Committee, a.k.a. the National Republican Party. For ease of reference, and to maintain consistency with the circuit court's order underlying the instant appeal, we will collectively refer to these defendants below, who are also appellees herein, as the Republican National Committee, or "RNC," except where designation of specific parties is warranted.

I.

FACTUAL AND PROCEDURAL HISTORY

In 1996, Ms. Pritt, a former West Virginia schoolteacher and state legislator, was the Democratic party's candidate for the office of Governor of the State of West Virginia. During the month immediately preceding the general election, the National Republican Senatorial Committee [hereinafter referred to as "NRSC"] formally organized the West Virginia State Victory Committee [hereinafter referred to as "Victory Committee"] pursuant to the election laws of this State. *See generally* W. Va. Code § 3-8-1, *et seq.* Among other activities, the Victory Committee sponsored and published numerous radio and television advertisements, during the final weeks of the campaign, which called into question Ms. Pritt's character and campaign platform. One of these radio spots specifically charged:

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from.
>
> In the State Senate, Charlotte Pritt proposed teaching first graders about condoms.
>
> Surprised? You shouldn't be.
>
> Senator Pritt also voted to permit the sale of pornographic Videos to children.
>
> She even voted to allow convicted drug abusers to work in our public schools.
>
> If parents can't trust Charlotte Pritt to protect our children, think also of our veterans.
>
> Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War.

> Senator Pritt voted to allow the burning of the American Flag that all veterans fought so hard to defend.
>
> She even opposed requiring students to begin their day with the Pledge of Allegiance.
>
> Look behind the Smile.
>
> Charlotte Pritt – wrong on the issues.
>
> Wrong for West Virginia[.]
>
> Paid for by West Virginia State Victory Committee
> Mary M. Dotter, Treasurer
> Not authorized by Underwood for Governor

Television advertisements backed by the Victory Committee made similar claims.

Given the temporal restraints of the campaign's culmination, Ms. Pritt was unable to respond to many of these allegations.[2] Ultimately, she lost the general election to the Republican nominee for Governor, Cecil Underwood. Shortly after Governor Underwood assumed office, the Victory Committee was dissolved.

Subsequently, on October 31, 1997, Ms. Pritt filed a civil action in the Circuit Court of Fayette County against RNC, NRSC, the Victory Committee, John Doe, and Jane Doe.[3] In her lawsuit, Ms. Pritt alleged that the defendants

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2 Once the damaging advertisements were disseminated, the Republican gubernatorial candidate, Cecil Underwood, denounced the ads, disassociated himself therefrom, and requested the Victory Committee to cease their further publication. The Victory Committee, however, refused these requests and continued to endorse the advertisements through Election Day 1996.

3 Ms. Pritt filed an amended complaint on October 26, 1998.

had defamed her,[4] exposed her to "false light" publicity, and violated W. Va. Code § 3-8-11(c) (1995) (Repl. Vol. 1999).[5] Following discovery, the defendants collectively moved for summary judgment.[6] By order entered May 15, 2000, the circuit court granted the defendants' motion, ruling, in part, that

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[4] Specifically, the circuit court denominated Ms. Pritt's defamation claims as defamation *per quod* (Count I) and defamation *per se* (Count III). *See* Black's Law Dictionary 427 (7th ed. 1999) (defining "defamation *per quod* " as "[d]efamation that either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is apparent but is not a statement that is actionable per se" and construing "defamation *per se* " to mean "[a] statement that is defamatory in and of itself and is not capable of an innocent meaning").

[5] W. Va. Code § 3-8-11 (1995) (Repl. Vol. 1999) criminalizes various improper election practices. Pertinent to the instant proceeding is subsection (c) thereof, which provides that

> [a]ny person who shall, knowingly, make or publish, or cause to be made or published, any false statement in regard to any candidate, which statement is intended or tends to affect any voting at any election whatever . . .
>
> . . . .
>
> [i]s guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than ten thousand dollars, or confined in jail for not more than one year, or, in the discretion of the court, shall be subject to both such fine and imprisonment.

W. Va. Code § 3-8-11(c).

[6] A motion for summary judgment is permitted by Rule 56(c) of the West Virginia Rules of Civil Procedure when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

> As a former state legislator and candidate for the office[ ] of Governor, plaintiff [Ms. Pritt] is a "public figure" for purposes of this lawsuit. . . .
>
> As a public figure, plaintiff must prove by "clear and convincing evidence" that the statements at issue were both false and published with "actual malice" – that defendants had "knowledge at the time of publication that they were false" or published them with "reckless and willful disregard for the truth." . . .
>
> Summary judgment on all four Counts is warranted because the statements at issue are not false. Defendants analyzed the legislative record and explained at length why all but one of the statements at issue are true, and why the last one is a protected expression of opinion. . . . In particular, defendants set forth plaintiff's legislative votes that supported each statement and countered the interpretations giving rise to plaintiff's claims. . . .
>
> Summary judgment on all four Counts is also warranted because there is no record evidence that any defendant acted with "actual malice."

(Citations omitted). In response to this ruling, Ms. Pritt filed, on May 25, 2000, a "motion for reconsideration," which the circuit court denied by order entered June 13, 2000. It is from these orders of the circuit court that Ms. Pritt now appeals to this Court.

II.

STANDARD OF REVIEW

The instant appeal comes to this Court from decisions of the circuit court granting summary judgment in favor of RNC and denying Ms. Pritt's post-judgment motion. We

typically apply a plenary review to an order of a circuit court deciding a summary judgment motion. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Finally, we must ascertain the appropriate standard of review to apply to the circuit court's order of June 13, 2000, whereby it denied Ms. Pritt's "motion for reconsideration." Generally speaking, "a 'motion to reconsider' is not a properly titled pleading in West Virginia." *Richardson v. Kennedy*, 197 W. Va. 326, 329, 475 S.E.2d 418, 421 (1996) (citations omitted). Nevertheless, we routinely re-characterize such motions as those made pursuant to Rules 59(e) or 60(b) of the West Virginia Rules of Civil Procedure depending upon when they were filed in the circuit court.

> When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e)[7] motion to alter or amend a judgment or a Rule 60(b)[8]

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[7] Rule 59(e) of the West Virginia Rules of Civil Procedure permits a party to file a "motion to alter or amend the judgment . . . not later than 10 days after entry of the judgment."

[8] W. Va. R. Civ. P. 60(b) permits, in pertinent part,

(continued...)

> motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).

Syl. pt. 2, *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996) (footnotes added). *Accord* Syl. pt. 1, *Richardson v. Kennedy*, 197 W. Va. 326, 475 S.E.2d 418 ("'A motion to amend or alter judgment, even though it is incorrectly denominated as a motion to "reconsider", "vacate", "set aside", or "reargue" is a Rule 59(e) motion if filed and served within ten days of entry of judgment.' Syllabus Point 1, *Lieving v. Hadley*, 188 W. Va. 197, 423 S.E.2d 600 (1992).").

In the case *sub judice*, it appears from the record that Ms. Pritt filed her "motion for reconsideration" within ten days of the circuit court's summary judgment order.

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[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Accordingly, we will treat this motion as one made pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. *See* Syl. pt. 2, *Powderidge*, 196 W. Va. 692, 474 S.E.2d 872.

> The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.

Syl. pt.1, *Wickland v. American Travellers Life Ins. Co.*, 24 W. Va. 430, 513 S.E.2d 657 (1998). Therefore, we apply a *de novo* standard of review to the circuit court's ruling in this regard. *See* Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755. Having established the standards of review applicable to this case, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Ms. Pritt raises numerous assignments of error, including the circuit court (1) improperly granted summary judgment to RNC when there existed a genuine issue of material fact; (2) failed to determine whether the Victory Committee's advertisements were defamatory; (3) erroneously excluded deposition testimony; and (4) neglected to address the remaining claims asserted in her amended complaint. Despite these various contentions, however, the primary matter to be resolved by this Court is the propriety of the circuit court's summary judgment ruling. It is with this issue, then, that we will begin our deliberation and determination of this case.

"The function of summary judgment is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required."

Powderidge, 196 W. Va. at 697, 474 S.E.2d at 877 (quoting *Hanlon v. Chambers*, 195 W. Va. 99, 106, 464 S.E.2d 741, 748 (1995)). Therefore, summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). In other words,

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Syl. pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

> On the other hand, and as suggested by Rule 56(c), this Court will reverse summary judgment if we find, after reviewing the entire record, a genuine issue of material fact exists or if the moving party is not entitled to judgment as a matter of law. In cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial.

Id., 194 W. Va. at 58-59, 459 S.E.2d at 335-36.

When assessing whether summary judgment is appropriate, then, one of the main considerations is whether there exists a genuine issue of material fact. *See* W. Va. R. Civ. P. 56(c); Syl. pt. 1, *Williams*, 194 W. Va. 52, 459 S.E.2d 329.

> "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient

> evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

Syl. pt. 2, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997). In making such a determination,

> [t]he circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986). Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. . . . In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [.]" *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513, 91 L. Ed. 2d at 216. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S. Ct. 178, 96 L. Ed. 666 (1951).

Williams, 194 W. Va. at 59, 459 S.E.2d at 336 (additional citations omitted). Moreover,

> [a] nonmoving party need not come forward with evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp.[v. Catrett]*, 477 U.S. [317,] 324, 106 S. Ct. [2548,] 2553, 91 L. Ed. 2d [265,] 274 [(1986)]. However, to withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party.

Williams, 194 W. Va. at 60-61, 459 S.E.2d at 337-38 (citation omitted).

With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury. Unlike the circuit court, we are not firmly convinced that the factual issues herein have been finally resolved. Specifically, before this Court, the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice. When faced with such an ongoing factual dispute, and inferences that, if viewed in the nonmovant's favor,[9] could support a verdict for the nonmovant, we must not continue to harbor these doubts as to whether summary judgment is appropriate but rather hand the case over to a jury, in whose province such factual

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[9] *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (counseling that, when deciding a motion for summary judgment, the reviewing tribunal "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. . . . In assessing the factual record, [it] must grant the nonmoving party the benefit of inferences. . . ." (citations omitted)).

determinations lie.[10] Accordingly, we reverse the circuit court's rulings granting summary judgment to RNC, and affirming the same, and remand this matter for further proceedings consistent with this Opinion.[11]

During our deliberation and decision of this case, it has come to our attention that the litigation of a cause of

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[10] We remain somewhat troubled by the circuit court's decision, during the summary judgment proceedings, to discredit the evidence introduced by Ms. Pritt to demonstrate the existence of a genuine issue of material fact. In prior cases we have held that

> "[t]he West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissi[bility] of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995).

Syl. pt. 9, *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997). While the circuit court generally possesses broad authority in this regard, where summary judgment proceedings are concerned, the evidentiary standard to be satisfied by the nonmoving party is not the same obstacle that he/she must overcome at trial. *See Williams*, 194 W. Va. at 60, 459 S.E.2d at 337 ("A nonmoving party need not come forward with evidence in a form that would be *admissible at trial in order to avoid summary judgment.*" (citation omitted)). Furthermore, Ms. Pritt suggests that the deposition testimony she offered was admissible pursuant to several different provisions of the West Virginia Rules of Evidence, and not just under the one relied upon by the circuit court. Therefore, upon remand, we urge the circuit court to consider these various evidentiary rules if Ms. Pritt seeks to re-introduce this testimony.

[11] Based upon this disposition of the instant appeal, we need not consider further Ms. Pritt's remaining assignments of error.

action for defamation can prove to be a daunting task for even the most learned jurist or the most experienced counselor. Therefore, in an attempt to clarify this nebulous area of the law, we will briefly set forth the various tenets applicable to the case *sub judice*, pursuant to which remand proceedings should be conducted. First, due to the status of the complainant herein, the case must proceed as directed by the first Syllabus point of *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975):

> A candidate for political office is governed by the same rules with regard to recovery for libel[12] as a public official and can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material.

(Footnote added). Thus, to sustain a cause of action for defamation, a public official, after establishing the existence of an allegedly defamatory statement, must prove that the statement was (1) false and (2) published with actual malice:

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[12] Generally speaking, "defamation" is "[a] false written or oral statement that damages another's reputation." Black's Law Dictionary 427 (7th ed. 1999). The specific type of "defamation" complained of herein is "libel," which is defined as "[a] defamatory statement expressed in a fixed medium, esp. . . . [an] electronic broadcast." *Id.* at 927.

> In order for a public official or a candidate for public office to recover in a libel action, the plaintiff must prove that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

Syl. pt. 1, *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992).

The next step in a public official's defamation case requires the presiding court to ascertain whether the statements complained of are defamatory. "A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syl. pt. 6, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986). In making this assessment, the tribunal must also consider whether the allegedly defamatory statements could be construed as statements of opinion. "A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection." Syl. pt. 4, *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293 (1994). "[W]hether a statement is one of fact or opinion is an issue that must be decided initially by a court." Syl. pt. 7, in part, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778.

Once this hurdle has been overcome, a public official must prove the cause of action's elements. Falsity, the first such element, was explained by this Court in our prior case of *State ex rel. Suriano v. Gaughan*, as follows:

> The law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Syl. pt. 4, 198 W. Va. 339, 480 S.E.2d 548 (1996). Actual malice, the second element to be proved in a public official's defamation action, is present if the statement at issue was made "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964). *See also* Syl. pt. 1, *Sprouse*, 158 W. Va. 427, 211 S.E.2d 674. "Reckless disregard" has been further defined by the United States Supreme Court in *St. Amant v. Thompson* as indicative that "the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968).

Finally, to establish actual malice, the complaining public official must prove its existence by clear and convincing evidence. "Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not." Syl. pt. 2, in part, *Suriano*, 198 W. Va. 339, 480 S.E.2d 548. *See also Sullivan*, 376 U.S. at 285-86, 84 S. Ct. at 729, 11 L. Ed. 2d at 710 (observing that a public official must prove actual malice with "convincing clarity"). *But see Dodd v. Pearson*, 277 F. Supp. 469, 471

(D.D.C. 1967) (requiring public official to prove actual malice by "a fair preponderance of the evidence"). Similarly, "[i]n order for a public official or a candidate for public office to recover in a libel action, he must prove by clear and convincing evidence that ... the stated or implied facts were false."[13] *Hinerman*, 188 W. Va. at 168-69, 423 S.E.2d at 571-72 (citations omitted). *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2, 109 S. Ct. 2678, 2682 n.2, 105 L. Ed. 2d 562, 572 n.2 (1989) (noting that "[t]here is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence," but concluding that the Court "express[es] no view on this issue"). *But see Rowden v. Amick*, 446 S.W.2d 849, 857 (Mo. Ct. App. 1969) (concluding that public official's burden of proof as to falsity and actual malice is by a "preponderance of the evidence" standard).[14] This burden of

---

[13] In her brief, Ms. Pritt contends that a public official need prove only by a preponderance of the evidence that the allegedly defamatory statements were false. However, the cases cited in support of this proposition do not definitively resolve this issue as their only references thereto consist of recitations of jury instructions with no corresponding rulings as to the appropriateness of such a standard therein. *See Estep v. Brewer*, 192 W. Va. 511, 514 n.3, 453 S.E.2d 345, 348 n.3 (1994) (per curiam); *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 462 n.10, 211 S.E.2d 674, 697 n.10 (1975).

[14] Although no longer relevant to the instant proceeding given that this case cannot be disposed of summarily, we note that a public official opposing a summary judgment motion must establish his/her *prima facie* case of defamation, and the elements thereof, by clear and convincing evidence:

> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), requires a libel plaintiff who is a public official or a public figure to resist a motion for summary

(continued...)

proof likewise was recognized by Justice Miller in his dissent to the majority's opinion in *Hinerman*:

> under First Amendment law, [a public official] plaintiff [has] to prove by clear and convincing evidence each of the . . . elements [of libel] to recover damages. . . . [Thus], the plaintiff [has] to prove that the . . . statements were, in the language of *Masson [v. New Yorker Magazine, Inc.*], false or misleading to the extent that the true facts would have produced a "'different effect on the mind of the reader'" because "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" [501] U.S. [496,] [517], 111 S. Ct. [2419,] 2433, 115 L. Ed. 2d [447,] 472 [(1991)] (Citations omitted).

188 W. Va. at 187, 423 S.E.2d at 590.

While the above survey of the law is not intended to be exhaustive, we do hope that it provides the necessary guidance for the continuation of the instant litigation. Thus, it is with great optimism that we have provided this concise rubric in the hope that future proceedings in this case will be fairly and judiciously determined.

---

judgment by showing clear and convincing evidence of the defendant's actual malice. That is, the federal (and state) constitutional protections of free speech require a stricter standard of evidence to survive pretrial motions in such cases than is required in other cases.

Crain v. Lightner, 178 W. Va. 765, 769 n.1, 364 S.E.2d 778, 782 n.1 (1987) (citing *Long v. Egnor*, 176 W. Va. 628, 635-36, 346 S.E.2d 778, 785-86 (1986)).

IV.

CONCLUSION

Because we find genuine issues of material fact rendered summary judgment improper in this matter, we reverse the May 15, 2000, and June 13, 2000, orders of the Circuit Court of Fayette County and remand this case for further proceedings consistent with this Opinion.

Reversed and Remanded.

Justice MAYNARD, deeming himself disqualified, did not participate in the decision of this case.

Judge MADDEN, sitting by temporary assignment.

ALBRIGHT, Justice, concurring.

I fully concur in the judgment of the Court and in Justice Davis' opinion.

I write separately to note disagreement with a position Appellees asserted. Appellees suggested to us, as I understood them, that because the author of the commercials at issue in this case asserted a belief that the information contained in the commercials relating to Appellant's past actions was factually accurate, neither Appellee could be found guilty of malice or be found to have defamed Appellant.

Respectfully, I suggest that the issue is what Appellees, or either of them, knew or should have known regarding the factual content and the context of the commercials. Appellees' appreciation of the factual content and the context of the commercials springs from the knowledge and experience of the leadership, staff and respective governing bodies of each of the Appellees. What

a hired wordsmith knew or should have known is but a part of the picture. Appellees cannot be permitted to hide behind deficiencies in that wordsmith's appreciation of what his commercials said to the public about Appellant.

I am authorized to state that Justice STARCHER joins in this concurring opinion.

APPENDIX B

Twelfth Judicial Circuit of West Virginia
Fayette County
Charles M. Vickers, Judge
P.O. Box 599
Fayetteville, West Virginia 25840
May 15, 2000

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Carey, Hill, Scott, Winter & Johnson
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Charleston, WV 25338

H.H. Roberts, Esq.
Suite 214, Professional Building
1036 Quarrier Street
Charleston, WV 25301

Re: Charlotte Pritt vs.
The Republican National Committee, et al.
Civil Action No. 97-C-380

Gentlemen:

The Court has reviewed the entire file in this action and has given the parties an opportunity to submit a proposed order prior to announcing a decision on defendants' motion for summary judgment.

The motion for summary judgment is granted, and the findings of fact and conclusions of law set forth in the proposed order are adopted by this Court as accurately reflecting the existing law and the record.

Very truly yours,

s/ Charles M. Vickers

IN THE CIRCUIT COURT FOR
FAYETTE COUNTY, WEST VIRGINIA

CHARLOTTE PRITT,

Plaintiff,

v. No. 97-C-380(v)

THE REPUBLICAN NATIONAL COMMITTEE, et al.,

Defendants.

SUMMARY JUDGMENT ORDER

The Court, having considered defendants' motion for summary judgment and the parties' memoranda of law, and having heard oral argument on August 26, 1999, hereby GRANTS defendants' motion for summary judgment.

FINDINGS OF FACT

Plaintiff, Charlotte Jean Pritt, a former member of the West Virginia state legislature, was the Democratic nominee for Governor of West Virginia in 1996. She lost that election. Defendants are the Republican National Committee, the National Republican Senatorial Committee, and the West Virginia State Victory Committee. From October 24 until November 5, 1996 (Election Day), the Victory Committee sponsored radio and television advertisements that discussed the legislative voting record of

plaintiff. These advertisements were created by political consultant David Welch, who is not a defendant.

Plaintiff filed a complaint against defendants on October 31, 1997, and filed the Amended Complaint that is the subject of this Order on October 26, 1998. The Amended Complaint asserts that through the advertisements, defendants defamed plaintiff per quod (Count I) and per se (Count III), violated W. Va. Code § 3-8-11(c) (Count II), and exposed plaintiff to "false light" publicity (Count IV). Plaintiff attached the radio advertisement to her Amended Complaint and has identified several statements as the basis of her claims.

CONCLUSIONS OF LAW

As a former state legislator and candidate for the officer of Governor, plaintiff is a "public figure" for purposes of this lawsuit. *Long v. Egnor*, 176 W. Va. 628, 630 (1986); *Sprouse v. Clay Commun., Inc.*, 158 W. Va. 427, 432, *cert. denied*, 434 U.S. 882 (1975).

As a public figure, plaintiff must prove by "clear and convincing evidence" that the statements at issue were both false and published with "actual malice" – that defendants had "knowledge at the time of publication that they were false" or published them with "reckless and willful disregard for the truth." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350-51 (1974). West Virginia courts are familiar with these requirements. *Long*, 176 W. Va. at 630; *Sprouse*, 158 W. Va. at 432. The court must "decide initially" whether the statements at issue are "capable of a defamatory meaning," *Long*, 176 W. Va. at 637, and "independently decide" whether plaintiff has come forward in response to a well-supported summary judgment motion with clear and

convincing evidence of actual malice. *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 511-12 (1984).

Summary judgment on all four Counts is warranted because the statements at issue are not false. Defendants analyzed the legislative record and explained at length why all but one of the statements at issue are true, and why the last one is a protected expression of opinion. *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 604-06 (1994). In particular, defendants set forth plaintiff's legislative votes that supported each statement and countered the interpretations giving rise to plaintiff's claims. Plaintiff's only record evidence concerning falsity (other than her own assertion) consists of deposition testimony from Michael Withers and Lyle Sattes, who served with plaintiff in the state legislature. These witnesses offered their opinion that two of the statements at issue falsely construed their intent in voting as they and plaintiff voted on the bills at issue. Opinion testimony, however, is not probative unless provided by an expert witness designated pursuant to W. Va. R. Civ. P. 26(b)(4), and plaintiff has not designated either of these witnesses as an expert. Neither witness disputed that plaintiff cast the votes at issue, or that the legislation could reasonably be interpreted as summarized in the advertisements. Their testimony does not create a genuine issue of material fact.

Summary judgment on all four Counts is also warranted because there is no record evidence that any defendant acted with "actual malice." Plaintiff contends that David Welch, who created the advertisements but is not a defendant, "should have known" the statements at issue were false. What Mr. Welch "should have known" is irrelevant because negligence does not satisfy plaintiff's burden of proof. *Masson v. The New Yorker Magazine*, 501 U.S. 496, 510 (1991). Further, Mr. Welch testified at his deposition that he reviewed the legislative record and believed the advertisements were "absolutely truthful." Craig Engle, General Counsel of defendant National Republican

Senatorial Committee, also stated in an Affidavit that he studied the advertisements, compared their statements with plaintiff's votes, and approved them for publication only after he was satisfied that they were true. There is no genuine issue of material fact concerning "actual malice."[1]

CONCLUSION

It is therefore ORDERED that defendants' motion for summary judgment is GRANTED as to plaintiff's Amended Complaint.

s/_____
Judge Charles M. Vickers
Circuit Court of Fayette County

ENTERED this 15 day of May, 2000.

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[1] The Court notes but does not consider defendants' contentions that all four Counts are time-barred, that plaintiff cannot prove any injury caused by the advertisements, and that neither Count II nor Count IV states a sufficient claim.

APPENDIX C

IN THE CIRCUIT COURT FOR
FAYETTE COUNTY, WEST VIRGINIA

CHARLOTTE PRITT,

Plaintiff,

v. No. 97-C-380(v)

THE REPUBLICAN NATIONAL COMMITTEE, et al.,

Defendants.

ORDER DENYING PLAINTIFF'S
"MOTION FOR RECONSIDERATION"

The Court, having considered the "motion for reconsideration" filed by plaintiff Charlotte Pritt, and having also considered the memoranda filed in support of and in opposition to said motion, hereby DENIES said motion as providing no basis for the Court to conclude that it erred in entering summary judgment for defendants by Order dated May 15, 2000.

s/_____
Judge Charles M. Vickers
Circuit Court of Fayette County

ENTERED this 13th day of June, 2000.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April, 2001, the following order was made and entered:

Charlotte Pritt, Plaintiff
Below, Appellant

vs.) No. 29326

The Republican National Committee,
et al., Defendants Below, Appellees

On a former day, to-wit, December 8, 2000, came the petitioner, Charlotte Pritt, by H. H. Roberts, her attorney, and presented to the Court her amended petition praying for an appeal from a judgment of the Circuit Court of Fayette County, rendered on the 13th day of June, 2000, with the record accompanying the petition. Thereafter, on the 5th day of January, 2001, came the respondents, the Republican National Committee, the National Republican Senatorial Committee and the West Virginia State Victory Committee, by Carey, Scott & Douglas, and Michael W. Carey, and Covington & Burling, Bobby R. Burchfield and Jason A. Levine, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal. Justice Maynard would refuse.

It is hereby ordered that the above-captioned proceeding be submitted upon the original record, briefs of counsel and oral argument if requested by the parties.

It is further ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellees to file a like number of briefs within thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

APPENDIX D

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

Charlotte Pritt, Plaintiff Below, Appellant

vs.) No. 29326

The Republican National Committee,
et al., Defendants Below, Appellees

On a former day, to-wit, July 9, 2001, came the appellees, the Republican National Committee, et al., by Carey, Scott & Douglas, and Michael W. Carey, and Covington & Burling, Bobby R. Burchfield and Jason A. Levine, their attorneys, and presented to the Court their motion in writing requesting the voluntary disqualification of the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, for the reasons stated therein.

Thereafter, on this day came the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, pursuant to Rule 29(f) of the Rules of Appellate Procedure, and notified the Clerk of the Court of his refusal to voluntarily disqualify himself.

DONE IN VACATION of the Supreme Court of Appeal this 10th day of July, 2001

Honorable Larry V. Starcher, Justice

Received the foregoing order this 10th day of July, 2001, and entered the same in Order Book No. 142.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

APPENDIX E

Supreme Court of Appeals
Charleston, West Virginia
25305

LARRY V. STARCHER
Justice

July 10, 2001

MEMORANDUM

TO: Rory Perry, Clerk

FROM: Justice Starcher

RE: *In Re: Appeal No. 00-2519*

A Motion to Disqualify Justice Starcher has been filed asking that I recuse myself "from presiding over or taking any action in this proceeding." The motion was filed on July 9, 2001, pursuant to Rule 29 of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia.

The Motion suggests that I should recuse myself from this matter because I was a candidate in 1996 and campaigned some with the Plaintiff-Appellant. Furthermore, it is suggested that I "made comments on the record seemingly prejudging this appeal" during oral arguments before the Court on April 3, 2001.

I was a candidate for election to the Supreme Court in 1996, but also were two other sitting justices – Justice Elliott Maynard and Justice Joseph Albright. It's also true that I did comment on the case in Court on April 3, 2001, as did other

justices. Justices are provided briefs before oral argument and do not come to the Courtroom uninformed. But whether my inquiries were "prejudicial," or whether I might have been playing the "devil's advocate," cannot be judged from the comments standing alone. Regardless, this would not bar me from sitting as an appellate judge on this case.

I decline to recuse myself from my judicial duties pursuant to Rule 29 of our Rules of Appellate Procedure because I neither have any financial or relationship interests in the matter, nor have I prejudged the legal or factual issues of the case. Despite my inquiry during oral arguments, and my being a candidate along with the Plaintiff-Appellant and two other justices in 1996, I can fairly sit on this matter and properly, correctly and fairly apply the law, whichever way it goes.

I respectfully decline to step aside in this matter.

LVS:lw

xc: Other Justices (with motion)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of October, 2001, the following order was made and entered:

Charlotte Pritt, Plaintiff
Below, Appellant

vs.) No. 29326

The Republican National Committee,
et al., Defendants Below, Appellees

This day came the Honorable Elliott E. Maynard, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of this Court, pursuant to Rule 29(b) of the Rules of Appellate Procedure, of his voluntary disqualification from participating in the above-captioned matter.

A True Copy

Attest: s/_____
Clerk, Supreme Court of Appeals

DAVID WELCH ASSOCIATES
Client: WV State Victory Committee
"Record"
TV/ :30 Seconds
WVE.001

VISUAL	AUDIO *(Voice over with music bed)*
Start close on CP's faced; pull out-to reveal smile	BEHIND CHARLOTTE PRITT'S CAMPAIGN SMILE IS A LIBERAL VOTING RECORD SHE CAN'T HIDE FROM.
Slow, grainy b&w of CP with kids. CG – Proof: 1989 Senate Bill 531 with bill image	IN THE STATE SENATE, CHARLOTTE PRITT PROPOSED TEACHING FIRST GRADERS ABOUT CONDOMS.
CG white on black: Surprised?	SURPRISED? YOU SHOULDN'T BE.
Adult video store…to close up of little girl CG: Proof: 1990 Senate Bill 184 with bill image	SENATOR PRITT ALSO VOTED TO PERMIT THE SALE OF PORNOGRAPHIC VIDEOS…TO CHILDREN.
Kids at school CG: Proof: 1990 Senate Bill 639 with bill image	SHE EVEN VOTED TO ALLOW CONVICTED DRUG ABUSERS TO WORK IN OUR PUBLIC SCHOOLS.

Return to CP's smile and freeze.
CG: Charlotte Pritt.
Wrong for West Virginia.
Paid by West Virginia State Victory Cmte.

LOOK BEHIND THE SMILE
CHARLOTTE PRITT.
WRONG ON THE ISSUES.
WRONG FOR WEST VIRGINIA.

APPENDIX F

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or

hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
FILED
JUL 9 2002
OFFICE OF THE CLERK

No.s 01-1328 & 01-1331

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

On Petitions for Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

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Counsel for Respondent

July 12, 2002

No.s 01-1328 & 01-1331

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

On Petitions for Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

H. H. Roberts, Attorney
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Counsel for Respondent

July 12, 2002

QUESTIONS PRESENTED

1. Is the decision by the Supreme Court of Appeals of West Virginia (West Virginia Supreme Court), which remands the case for further proceedings consistent with recognized decisions by the Supreme Court of the United States, a "final judgment" as contemplated by 28 U.S.C. § 1257(a)?

2. Are there "compelling reasons" for the Supreme Court of the United States to grant a writ of certiorari to review a decision of the West Virginia Supreme Court which decision is not within the parameters set forth in Rule 10[1]?

3. Are there compelling reasons for the Supreme Court of the United States to grant a writ of certiorari to review a decision of the West Virginia Supreme Court which would require the Court to review, *de novo,* a voluminous record designated by the parties from the lower court and require the Court to substitute its judgment for that of the West Virginia Supreme Court which decided the matter on a 5 - 0 vote?

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[1] Reference is made to U.S. Supreme Court Rule No. 10, "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI."

PARTIES TO THE PROCEEDINGS

The following are parties to the proceedings below:

(1) Plaintiff, Ms. Charlotte Pritt, a school teacher and the Democratic nominee for Governor of West Virginia in the 1996 general election.

(2) Defendant, the Republican National Committee (RNC), the national Republican party official organization under the United States Federal Election Commission (FEC).

(3) Defendant, the National Republican Senatorial Committee (NRSC), a political committee registered with the FEC under FECA. It is devoted to the election of Republican candidates to the United States Senate.[2]

(4) Defendant, the West Virginia State Victory Committee (WVSVC), the alter-ego of the NRSC, having common employees as officers and a common address. It was organized by the NRSC in October 1996 and registered with the W. Va. Secretary of State on October 4, 1996. Its sole purpose and function was to air political advertisements against the Plaintiff. The WVSVC was dissolved by the NRSC on April 6, 1998.

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[2] *Federal Election Commission v. National Republican Senatorial Committee,* 761 F. Supp. 813, 816 (D.D.C. 1991).

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BRIEF IN OPPOSITION

This Brief is in opposition to two Petitions for writ of certiorari for review of a 5-0 decision rendered by the Supreme Court of Appeals of West Virginia (West Virginia Supreme Court) in the case of *Charlotte Pritt v. The Republican National Committee, et al.*, 557 S.E.2d. 853 (2001).

I. OPINIONS BELOW:

There are three decisions which have been generated by this case to date, namely:

(1) *Pritt v. The Republican National Committee, et al.*, 1 Fed.Supp.2d 590 (1998), whereby the District Court remanded the case back to Fayette Circuit Court on April 16, 1998.
(2) Fayette Circuit Judge Vickers' order granting Petitioners' Motion for Summary Judgment on May 15th, 2000.[3]
(3) The 5-0 decision by the West Virginia Supreme Court, filed December 12, 2001, 557 S.E.2d. 853 (2001), which reversed Judge Vicker's decision on the basis of the Court's *de novo* review of the record.[4]

---

[3] See page 25a of the Appendices of both Petitioners' Petition.

[4] A copy of this decision is included in both of Petitioners' Petitions as "Appendix A". Respondent's Brief will refer to page numbers in Petitioners' "Appendix A", the West Virginia Supreme Court decision. E.g. 1a is the first page of the decision.

II. JURISDICTION:

The Petitioners' section on "Jurisdiction" does not accurately portray the West Virginia Supreme Court decision, the facts of the case or the applicable law as to the question of jurisdiction.

Petitioners contend that the decision of the West Virginia Supreme Court is a "final judgment" as contemplated by 28 U.S.C. § 1257(a) and should be reviewed by a writ of certiorari. Respondent disagrees with this and contends that the West Virginia Supreme Court decision is not a "final judgment".

Black's Law Dictionary defines "final judgment".

> "***Final Judgment*** **is one which puts an end to a suit".**[5]

The subject case was remanded by the West Virginia Supreme Court for trial under guide lines consistent with prior decisions. No "final judgment" was rendered. The further proceedings provided for will give both parties ample opportunity to fully develop their positions and their respective portions of the case.

> "Under 28 U.S.C. § 1257, this Court has jurisdiction to review only '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' Because the Colorado Supreme Court, 633 P.2d 455, remanded this case

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[5] *Blacks Law Dictionary, Third Edition,* page 1027.

> for trial, its decision in not final 'as an effective determination.'"
> *O'Dell, et al. v. Espinoza, et al.,*
> 456 U.S. 430, (1982)

Petitioners cite several decisions as "exceptions" to the "final judgment" rule. What transpired in the lower court and the West Virginia Supreme Court does fall in any of these "exceptions".

ASARCO Inc., et al. v. Kadish, et al., 490 U.S. 605 (1989), presented a constitutional challenge to Ariz. Rev. Stat. Ann. 27-234(B). The Court reviewed and reversed the Arizona Supreme Court decision that decided the subject statute was constitutional. The Court noted two "exceptions" to the "final judgment or decree" rule.

> (1) Where "the federal issue is conclusive" and "the outcome of further proceedings pre-ordained" and,
>
> (2) the federal questions that could come to this Court have been adjudicated by the state court, and the remaining issues will not give rise to any further federal question.

Our present case does not involve the constitutional challenge of a state statute and does not fall within this two part exception.

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) involved "freedom of the press".

The father of a rape victim brought a civil action against the Broadcasting company on the basis that they had violated the Georgia "rape shield" statute by publishing the name of his daughter. The trial court

granted a summary judgment in favor of the father since there were no issues as to the facts. The Broadcasting company contested the constitutionality of the statute since the name of the victim was a matter of public record. The Georgia Supreme Court affirmed the lower court and remanded for further proceedings.

Following a "pragmatic approach" the Court reviewed the case on Certiorari as a "final decision or decree" of the states' highest court involving a state statute that may be in conflict with the First and Fourteenth Amendments. The state statute imposed sanctions on a television company that had accurately reported judicial records maintained in connection with prosecution. These records were a matter of public information.

Our present case clearly does not fall inside the frame work of the *Cox "exception"* which involves the constitutionality of a state statute.

In *Miami Herald Company v. Tornillo,* 418 U.S. 241 (1974) "freedom of the press" was the issue. The Florida statute in question required newspapers which "assail the character of a political candidate" to afford free space for reply by that candidate. The lower court ruled that the statute was unconstitutional. The Florida Supreme Court reversed the lower court and remanded for further proceedings.

The Court considered the Florida Supreme Court's decision as a "final decision" and reversed. The constitutionality of a statute was the pivotal issue of the civil claim. The Florida Supreme Court had made what amounted to a "final decision" in

this regard and had remanded the case to go forward on that premise.

In our present case we do not have the constitutionality of a statute at issue.

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) is cited for the proposition that the First Amendment protection is a "federal policy" which merits exception to the "final decision" rule. In that case, the Indiana RICO statute was challenged by the defendant's claim that its First Amendment rights had been denied. *Fort Wayne Books* had been charged with repeated violations by distribution of obscene matter which was treated as a pattern of conduct and in violation of the RICO statute. Upon certification, the Indiana Supreme Court ruled the statute constitutional.

The Court affirmed the decision and stated that it was appropriate to review the case "[W]here the federal issue has been finally decided in the state courts..." In our present case, the West Virginia Supreme Court did not finally decide any federal issue.

Again, we have a state statute involved. The above citation does not apply to our present case.

All four decisions cited by Petitioners involve challenge to the U. S. Constitution by a state statute.

Court's Rule 10, "Considerations Governing Review on Certiorari" is very instructional as to when the Court would be expected to exercise its discretion to review on certiorari. "A petition for a writ of certiorari will be granted only for compelling reasons."

This case does not satisfy Rule 10 in that we do not have a situation where a "state court of last resort has decided an important question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" as provided by Rule 10(b).

Nor do we have a situation where "a state court...has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." as provided by Rule 10(c).

The West Virginia Supreme Court merely addressed the propriety of a lower court's summary judgment and remanded with guidance consistent with decisions of the Supreme Court of the United States.

Finally, at this juncture of the case, with no "final judgment" having been rendered, with prospects that both parties will have full opportunity to develop their respective portions of the case, with prospects that there will be opportunities for both parties to seek review in the future by the Court of any constitutional questions that may arise and the fact that Petitioners have lost no rights nor suffered any detriment at this time, there is **no compelling reason** the Court should review this case.

A review of this case should not be granted merely on Petitioners' speculation that in the future, they may be denied some constitutional protection.

III. CONSTITUTIONAL PROVISIONS:

Respondent agrees with Petitioners that the First and Fourteenth Amendment to the United States Constitution are involved in this case. Respondent does not agree, however, with Petitioners' speculation that by allowing this case to go forward, a conflict with these Amendments will develop. Quite the contrary, Respondent is of the opinion that it is necessary to allow this case to go forward to protect Respondent's rights under the Fourth Amendment.

We must also consider the Constitutional mandate that provides for the election of government officials. False advertisements about the Respondent misinformed the electorate. A misinformed electorate is effectively disenfranchised. This defeats the "election of government officials" principle. The principle of "governed by the consent of the governed" is effectively nullified by a misinformed electorate.

IV. STATEMENT OF THE CASE:

This case is a common law libel action by a nominee for a state office against two national political organizations which, on the eve of an election, fabricated, paid for and arranged for the broadcasting of a series of "negative ads" about Respondent that were false and misleading.

The action below is not against the Respondent's opponent, who disavowed the subject advertisements and ask that they be terminated.

The action below is not against any element of the media and hence "freedom of the press" is not an issue.

The action below has been prosecuted solely by Respondent as an individual and no political organizations of any nature have contributed to its prosecution, financially, technically or in any other manner.

Respondent, Charlotte Pritt, was a school teacher with 17 years experience in the public school system. She was a former member of the House of Delegates and the State Senate and was the Democratic nominee for Governor in the 1996 West Virginia general election. On the eve of the election, Petitioners fabricated and published a series of false negative advertisements about Respondent that libeled, slandered and defamed her. These advertisements were broadcast 106 times in Fayette County by two Fayette County radio stations. The advertisements were also broadcast state wide by five television stations and seventeen radio stations.

Respondent brought the subject libel action in state court (Circuit Court of Fayette County, West Virginia) on October 31, 1997. This libel was based on the false and misleading political advertisements which were arranged for by NRSC through its alter-ego, the West Virginia State Victory Committee (WVSVC).

The political advertisements at issue were each identified in a Report filed with the West Virginia Secretary of States Office by the Petitioners' media services (Mentzer Media) as "ad(s) opposing Pritt". Collectively, hereafter, reference will be made to the

"Ads opposing Pritt" or the "Ads" and include all the television and radio advertisements that Respondent has identified from the required Reports made to the Secretary of State.

Petitioners immediately removed the case to the District Court for the Southern District of West Virginia which remanded the case back to Fayette Circuit on April 16, 1998. The Fayette Circuit Court set a trial date of June 5, 2000.

On June 15, 1999, pursuant to W. Va. R. Civ. P. Rule 56[6], Petitioners filed a Motion for Summary Judgment. Oral hearing was held by the Fayette Circuit Court on August 26, 1999. By order dated May 15, 2000, the court granted summary judgment.

Respondent petitioned for and was granted an appeal by the West Virginia Supreme Court on December 8, 2000. The court heard oral arguments on October 3, 2001 and by 5-0 decision, entered on December 12, 2001, reversed the lower court's decision granting summary judgment.

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[6] W.Va.R.Civ.P. Rule 56(c) provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."** (Emphasis provided)

V. SUMMARY OF ARGUMENT:

Respondent's argument includes the following points:

1. Respondent disputes Petitioners' argument that there is jurisdiction for review of this case under a writ of certiorari. This is addressed in the "JURISDICTION" section of this Brief .
2. Respondent disputes Petitioners' argument that the West Virginia Supreme Court failed to independently review the record.
3. Respondent disputes Petitioners' argument that there is no evidence as to the falseness of the "Ads opposing Pritt"
4. Respondent disputes Petitioners' argument that there is no evidence as to the "actual malice" of the Petitioners in publishing the "Ads opposing Pritt".
5. Respondent disputes Petitioners' argument that this case poses a serious and imminent threat to the First Amendment that requires it be reviewed under a writ of certiorari.

VI. ARGUMENT:

Repondent's argument which follows is not in anyway to be interpreted as deprecating the serious concerns Respondent has with the question of jurisdiction .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which is noted twice in the West Virginia

Supreme Court decision, is of great precedential value to our present case. Liberty Lobby brought a libel action in D.C. District Court against Jack Anderson, publisher of the "Investigator" which published three articles about founder Willis Carto. This action alleged the articles contained 28 statements and 2 illustrations that were false and derogatory. On motion by defendant, under Rule 56, the District Court granted summary judgment. The Court of Appeals affirmed in part and reversed in part. The U. S. Supreme Court reversed the Court of Appeals and remanded the case for further proceedings. At page 247 the Court stated:

> "More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

At pages 247/248 the Court further stated:

> "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

In *Anderson v. Liberty Lobby*, at page 250, the Court notes the role of the jury as to the issue of "credibility":

> "Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge whether he is ruling on a motion for summary judgment or for a directed verdict."

Credibility of Petitioners and those working for them is an important aspect of Respondent's proof that the "Ads opposing Pritt" were false negative ads that were spawned in a stream of deception.

At least seven areas of deception by Petitioners can be identified relative to the "Ads opposing Pritt".

(1) In order to convince them to broadcast the "Ads", Petitioners' political consultant, David Welch (Welch) sent a letter to the various TV and Radio stations prior to their broadcast that distorted Respondent's legislative record.

(2) Shortly after the "Ads" commenced, Petitioners' Welch, the author of the "Ads", made a false statement to the press that the "Ads" were paid for by West Virginia donors.

(3) The "Ads" indicated that they were paid for by the WVSVC when in fact they were paid for by a loan that the NRSC received from Signet Bank.

(4) The use of WVSVC as an alter-ego of the NRSC hid the real identity of the Petitioners and projected a

false image that the "Ads" were produced by West Virginians.
(5) The "Ads" purported to set forth Respondent's legislative record when in fact they were a gross distortion of the record that reached absurd results and omitted significant parts of her record which deceived the voting public.
(6) Twelve days after the election, Welch, falsely stated to the press that "the state business community decided to do the independent advertising campaign against Pritt."
(7) On deposition, Welch professed that the "Ads" were an effort to truthfully report Respondent's record yet he admitted that he used the **"part of the voting record that perhaps would be most important to the people who are sponsoring the ad."**

The sin of "omission" can be as great and as effective as the sin of "commission" when the design of the actor is to deceive.

Argument in Response to RNC:

As required by law, the West Virginia Supreme Court reviewed the designated record *de novo,* considered the parties' briefs and conducted an oral hearing on October 3, 2001 and, on December 12, 2001, the Court unanimously decided that the lower court's decision should be reversed on the basis that that there were genuine issues of material fact which should be presented to a jury.

The Court remanded the case back to the Circuit Court of Fayette County for further proceedings and provided a survey of the applicable law as guidance

for continuation of the litigation including *New York Times v. Sullivan*[7], *Anderson v. Liberty Lobby*[8], *Harte-Hanks Communications, Inc. v. Connaughton*[9], *St. Amant v. Thompson*[10], *Masson v. New Yorker Magazine, Inc.*[11], *Sprouse v. Clay Communications*[12], *Hinerman v. Daily Gazette Co. Inc.*[13], *Long v. Egnor*[14], *Maynard v. Daily Gazette Co.*[15] and *Suriano*[16].

The following are misleading representations made by the RNC in their Petition concerning the West Virginia Supreme Court decision:

(1) At page 11, line 10 of their petition, the RNC states that "the Supreme Court of Appeals failed to conduct an 'independent review' of the record to assure that it contained the requisite clear and convincing evidence of actual malice." In the West Virginia Supreme Court decision at page 10a, line 5 the Court stated:

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[7] *New York Times Co. v.* Sullivan, 376 U. S. 254 (1964).
[8] *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986)
[9] *Harte-Hanks Communications Inc. v. Connaughton,* 491 U.S. 657 (1989).
[10] *St. Amant v. Thompson,* 390 U.S. 727, (1968).
[11] *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991).
[12] *Sprouse v. Clay Communications, Inc.,* 211 S.E. 2d. 674 (1975).
[13] *Hinerman v. Daily Gazette Co.,* , 423 S.E.2d 560 (1992)
[14] *Long v. Egnor,* 346 S.E.2d 778 (1986)
[15] *Maynard v. Daily Gazette Co.,* 447 S.E.2d 293 (1994)
[16] *State ex rel. Suriano v. Guaghan,* 480 S.E.2d 548 (1996)

> "Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law."

The challenged decision (and "Syllabus by the Court") makes reference to "clear and convincing" or "convincing clarity" **no less that ten times**. It can hardly be said that the West Virginia Supreme Court ignored or was unmindful of this principle.

(2) At page 19, line 11, the RNC states "Although the court recognized the general applicability of this heightened standard of proof, it deemed the standard 'no longer relevant' because the case 'cannot be disposed of summarily. App. 20a n. 14.'"

This footnote concerned the West Virginia Supreme Court's discussion as to whether "falsity must be shown by clear and convincing evidence." What the Court actually said was:

> "Although no longer relevant to the instant proceeding given that this case cannot be disposed summarily, we note that a public official opposing a summary judgment must **establish his/her *prima facie* case of defamation, and the elements thereof, by clear and convincing evidence**." (emphasis supplied).

By deleting this section of the footnote, the Petitioner totally reversed what the Court said.

(3) Again, at page 21, line 10, the RNC restated this distortion of footnote 14 in support of the proposition that the West Virginia Supreme Court failed to observe the requirement of proof by "clear and convincing evidence" placed on a public figure.

(4) At page 23, line 11, the RNC stated, "As noted above, the West Virginia court conducted no factual review and failed to apply the proper evidentiary standard." What the Court said at page 15a, line 12 was, "With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury." How can the Petitioner conclude the "court conducted no factual review".

Argument in Response to NRSC:

In support of their Motion for Summary Judgment and in support of their Petition for Writ of Certiorari the NRSC contends that the "Ads opposing Pritt" were truthful. An example of this oft repeated theme is at page 7, line 12 of the NRSC's Petition. "Mr. Welch believed that the statements in the advertisements were '[a]bsolutely truthful' and presented a 'fair and accurate portrayal of [Respondent's] voting record' on each one of the bills and amendments at issue."

At page 7, line 29, "Having completed his independent review, Mr. Engle was satisfied that the advertisements 'truthfully portrayed' both the legislation at issue and Respondent's vote on that legislation."

The NRSC's proof of "truthfulness" includes only (1) statements made by Welch in his deposition taken by the Respondent, (2) Craig Engle's affidavit and (3) distortions of answers by Respondent in her deposition. Other than this, Petitioners had no proof in regard to their defense that the "Ads opposing Pritt" are true. Petitioners, through Welch and Engle, were the "fabricators" of the "Ads opposing Pritt", as distinguished from merely repeating the allegations in the "Ads" such as a newspaper reporter would do.

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact (a jury) must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to prove persuasive, for example, where a story is **fabricated** by the defendant, is the product of his **imagination**..." (Emphasis/ parenthesis added). *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

The definition of falseness is no mystery. In *Masson v. New Yorker Magazine,* 501 U.S. 496, 517 (1991) the Court answers "the question on falsity".

> "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts 563, Comment c (1977); W.

> Keeton, D. Dobs, R. Keeton & D. Owen, Proser and Keeton on Law of Torts 766 (5th ed. 1984)....Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'"

As the allegations in the "Ads opposing Pritt" are compared, on a one by one basis, with Respondent's legislative record on the subjects, we are left with the inescapable conclusion that the allegations in the "Ads" "have a different effect on the mind of the" listener or viewer "from that which the pleaded truth" of the record would produce.

Petitioners postulate that the lower Court's decision is in some manner superior to that of the West Virginia Supreme Court. What they don't tell us, however, is that Judge Vickers did not write the order granting summary judgment. Judge Vickers simply entered an order that Petitioners prepared and submitted without solicitation, approximately six months earlier.

In the pre-trial hearing on May 11, 2000, four days before entry of the order granting summary judgment, Judge Vickers expressed concern about "not having a clerk...the volume of the materials contained in the case" and it being "a little bit troubling to the Court when we've got to, in essence try these cases twice, oftentimes." His entry of summary judgment was not based on independent review of the record but instead was motivated by a desire to send the

case to the West Virginia Supreme Court and get the benefit of their ruling to avoid "try(ing) these cases twice".[17]

Throughout their Petition, the NRSC attacks the West Virginia Supreme Court decision with the proposition that the Court did not conduct an independent review of the record below. This is without merit.

At page 5a, the W. Va. Supreme Court stated:

> "Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we agree with Ms Pritt that genuine issues of material fact do preclude the disposition of this matter by summary judgment."

Starting at page 9a, The West Virginia Supreme Court devoted one full section of its decision to the standard of review required for the case:

> "STANDARD OF REVIEW
>
> The instant appeal comes to this Court from decisions of the circuit court granting summary judgment in favor of RNC and denying Ms. Pritt's post-judgment motion.

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[17] Designated Record to the West Virginia Supreme Court at page 41.

> We typically apply a plenary review to an order of a circuit court deciding a summary judgment motion. "A circuit court's entry of summary judgment is review *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 451 S.E.2d 755 (1994). Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law."

See also page 15a:

> "With these principles in mind, and upon a review of the record submitted for appellate consideration in this case, we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury."

Including the three instances above, the West Virginia Supreme Court decision refers to their review of the record a total of six times. They also recite certain evidence taken from the record. This hardly sounds like they failed to conduct an independent review of the record before making their decision.

The proposition that the United States Supreme Court should grant certiorari to protect the First Amendment at this time is without merit. This case does no violence to the First Amendment nor does it threaten to do so. It is necessary to allow

the case to be fully developed to allow the measuring of the Respondent's Fourth Amendment rights against the First Amendment claim.

The First Amendment , part of the "Bill of Rights", is analogous to the English "Magna Charta" of 1215 and the English "Bill of Rights" of 1689. These three documents were written and designed to protect the people from action by the government; the Crown in the case of the England and the Federal Government in the case of the United States. The First Amendment was originally written and designed to give the citizens of the United States (the people) the freedom to speak their mind without fear of reprisal from the Federal government. **The First Amendment is not now, never has been, nor ever was intended to be a "license to lie".** It was never intended to deprive individuals of their right to defend their reputations in actions of libel.

Petitioner, NRSC, includes excerpts of the "record" which they contend demonstrates that the "Ads opposing Pritt" are true. These excerpts and their comparison with the "Ads opposing Pritt" shows that the "Ads" are **literally false.** The following response to the NRSC's Petition is parallel numbered.

1. To show that the allegation **"In the State Senate, Charlotte Pritt proposed teaching first graders about condoms"** is true, the NRSC refers to Senate Bill 531. (See page 20 of the NRSC's Petition).

Respondent was approached by her constituents about legislation of this nature and were sent to the Legislative Services to prepare the bill. The result, Senate Bill 531, which Respondent did not draft but did sponsor. Comparing the language of the "condom allegation" with the language of Senate Bill 531 shows the allegation is **literally false.** There is no mention of "teaching first graders about condoms". What was to be taught was to be determined by the school boards and approved by the parents. There was no such proposal by Respondent.

> "[T]he state board of education shall cause to be taught in all of the public schools of this state the subject of human growth and development, including the social aspects, contraception, diseases and *all other special instruction deemed appropriate and necessary by the state board. The state board shall determine the necessary time of instruction of human growth and development which shall be provided to grades kindergarten through twelve. Textbooks on the subject of human growth and development adopted for use in the public schools of the state shall contain appropriate material for teaching that subject.*
>
> *An opportunity shall be afforded to the parent or guardian of a child subject to instruction of the human growth and development course to examine the course curriculum requirements and materials to be used in such instruction.* (Underscore/italics provided).

It is absurd to conclude that the various school boards and the parents, all of whom would be involved in the decision making process, would determine that Bill 531 was a proposal for "teaching first graders about condoms." It is absurd to contend that proposed Bill 531 could truthfully be interpreted to be a proposal by Respondent for " teaching first graders about condoms."

The Uniform Statute and Rule Construction Act § 18(a) states: "A statute or rule is construed so as to avoid an unconstitutional, absurd, or unachievable result." *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100 (1997) notes "It is a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided."

At page 21 the NRSC is "boot strapping" it by distorting Respondent's deposition and suggest that she agreed that "sex education" for first graders included "instruction on 'contraception'".

2. At page 22 the NRSC cites Respondent's 1990 vote against an amendment to Senate Bill 184 to support the allegation that she "voted to permit the sale of pornographic Videos to children." This is a misinterpretation of the phrase "video movie which is rated 'X'". In 1990, "X" rated movies by the Movie Industry were the equivalent of today's PG-17 movies and were not pornographic. In 1990, "XXX" movies were considered as pornographic. The television version of this "pornographic allegation" completes the deception of this allegation with a subliminal back drop that shows a red "XXX".

3. At page 22, the NRSC cites a vote by Respondent against a proposed amendment to Senate Bill 639 as proof of the truthfulness of the allegation that "She even voted to allow convicted drug abusers to work in our public schools." This is literally false. No mention of the employment of "drug abusers in the public schools" is mentioned in the amendment. The false distortion of the meaning of her vote on this amendment is further apparent by the fact that **a majority of the Senate voted with her against this amendment.** It is absurd to say that the W.Va. Senate voted to allow the employment of "drug abusers in the public schools."

4. At page 23, the NRSC makes a bizarre effort to justify the conclusion that "... parents can't trust Charlotte Pritt to protect our children..."

On deposition, David Welch simply explained that since Charlotte Pritt had (1) proposed the teaching about condoms to first graders, (2) had voted for the sale of pornographic videos to children and (3) had voted to allow drug abusers to work in the public schools, parents couldn't trust her to protect their children. This allegation is based on the absurd, false distortions of the Respondent's legislative record.

Charlotte Pritt is a school teacher. **The allegation that "parents can't trust Charlotte Pritt to protect our children" is libel *per se.***"

5. At page 24, the NRSC relies on Respondent's vote against Concurrent Resolution 4

(CR 4) to support the allegation "**Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War.**"

CR 4 was a Resolution by the Senate that, in January of 1991, encouraged then President Bush to take steps to restore self government to Kuwait. The Senate Journal preliminary language, on page 57, dated January 14, 1991, is as follows:

"**House Concurrent Resolution No. 4**—Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East."

The portion of CR 4 which the NRSC refers to was an amendment to the original resolution. The purpose of CR 4 was not to "honor the men and women of West Virginia who fought in the Gulf War". This language in the CR 4 was superfluous and was added to encourage passage of the Resolution. Respondent voted against U. S. Military involvement in the Mid-East, not against honoring the West Virginia Service men and women.

Later, the Gulf War situation was revisited by Legislature in February, 1992. House Joint Resolution No. 109 (HJR 109), a Veteran's Bonus, most of which went to the Gulf War veterans, was passed by the Legislature. Respondent voted for and spoke in favor of this bonus.

This is another example of deception by omission. To reach the conclusion presented by the

"Gulf war allegation", Petitioners selectively ignored the real purpose of CR 4 and ignored Respondent's vote for HJR 109 which "honored" the Gulf War Veterans by giving them a bonus.

6. At page 26, the NRSC distorts the effect of Senate Resolution 31 (SR 31). This resolution was not intended to "**allow** the burning of the American Flag". Quite simply, it was intended to ultimately lead to "criminalization" of the burning of the Flag. Prior to this the Court had addressed this question in the case of *Texas v. Johnson*[18] where the Court said the "burning of the flag...is expressive conduct" protected under the First Amendment freedom of speech. The question before the Senate was not the "allowing of the burning of the Flag" The question was whether to pass a resolution which would have encouraged the criminalizing of the burning of the flag.

7. At page 27, the NRSC refers to Respondent's vote against House Bill 1193 (HB 1193). This Bill made it mandatory for "the Pledge of allegiance to the United States flag in public schools at the start of every instructional day". It also exempted students who for religious or moral reasons felt they could not make this pledge. An amendment was proposed that excused teachers on the same basis on which students were excused. The Respondent voted for this amendment but it was defeated. Respondent voted against the bill since it did not provide for excusing the teachers. Delegate

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[18] *Texas v. Johnson*, 491 U.S. 397 (1989).

Casey spoke explaining the vote against the Bill was because to "require the teachers to participate is unconstitutional in addition to being illogical".

VII. *SPROUSE V. CLAY COMMUNICATIONS:*

The Petitioners cite a total of 94 decisions in their Petitions, including 29 citations that involve state court decisions. One decision, *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d. 426, is noticeable absent, notwithstanding that this decision was cited in all prior briefs by the Petitioners.

Sprouse was an attorney with approximately 17 years experience. He was the Democratic nominee for governor in 1968. On the eve of the election the Charleston Daily Mail (Daily Mail), owned by Clay Communications, Inc., fabricated and published a series of false negative articles about Sprouse that libeled, slandered and defamed him. The Daily Mail had many readers in Fayette County and was widely distributed throughout the state.

Sprouse brought a libel action in state court (Circuit Court of Fayette County, West Virginia).

Sound familiar?

After a jury trial, Sprouse prevailed and judgment was entered for the jury award. Clay Communications appealed resulting in the decision cited above. Clay Communications petitioned the United States Supreme Court for a writ of certiorari. The American Newspaper Publishers Association were granted leave to file an *amicus* brief. A writ of certiorari was denied. See 423 U.S. 882.

Sprouse was one of the first decision to determine that *New York Times v. Sullivan* applied to a candidate for public office. It was also one of the first decisions requiring that "actual malice" be proven by "clear and convincing evidence". *New York Times v Sullivan* involved elected law enforcement officials who were granted a jury award against the *Times*. The *Times* decision did not use "clear and convincing" but instead concluded "lacks the convincing clarity which the constitutional standard demands".[19]

The *Sprouse* decision is so parallel to our present fact scenario that is unconscionable to omit discussion of it in a brief concerning this case.

VIII. CONCLUSION:

Respondent concludes with the following:

(1) The West Virginia Supreme Court' decision is not a "final Judgment" as contemplated by 28 U.S.C. § 1257(a).

(2) There is no "compelling reason", as contemplated by Rule 10, for the Court to review this case by granting certiorari.

(3) The RNC and NRSC Petitions do not fairly portray the West Virginia Supreme Court decision and are misleading.

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[19] *New York Times v. Sullivan*, 376 U.S. 254, 285/286 (1964)

(4) The NRSC Petition does not accurately portray the "facts" of this case and is misleading.

(5) A writ of certiorari should not be granted on speculation by the Petitioners that there may, in the future, be some violation of their rights protected under the First Amendment.

(6) The "Ads opposing Pritt" were not "robust political discussion" as protected by the numerous First Amendment decisions. These "Ads" were pure, unadulterated character assassination of a candidate for a state office, by a national political organization that had unlimited funds, in an effort to control a state election.

(7) The proof of falseness of the "Ads opposing Pritt" is demonstrated by: (a) Comparison of Respondent's record with the "Ads", (b) Respondent's point by point response to the NRSC at pages 21 through 27, (c) the testimony of witnesses Withers and Sattes which was improperly excluded by the lower court and (d) the testimony of Respondent.

(8) The proof of "actual malice" is demonstrated by (a) David Welch's admission that he only used the part of Respondent's record that would be of interest to the Petitioners, (b) the refusal by the Petitioners to consider terminating the "Ads opposing Pritt" when requested to do so by her opponent (c) the pattern of deception surrounding the broadcasting of the "Ads" which destroys the credibility of the Petitioners and supports the conclusion that they did

know the "Ads" were false or did publish them with willful disregard of their truth or falsity.

(9) It is necessary to let the subject case go forward and allow the parties to fully develop their portions of the case in order to protect the Respondent's rights under the Fourth Amendment.

(10) Petitioners' position that greater weight should be given to the Circuit Court's decision granting Summary Judgment than the decision by the West Virginia Supreme Court reversing that decision and remanding for trial is unfounded.

(11) The "guidance" set forth in the West Virginia Supreme Court's decision assures that the case will be tried under the applicable law as found in the various decision by the United States Supreme Court. This case does not threaten to do any violence to the First Amendment.

For the foregoing reasons, a writ of certiorari, summarily reversing the judgment of the West Virginia Supreme Court, should **not** be granted.

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No. 01-1331

IN THE

Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE *et al.*,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

For some four decades, this Court has mandated two constitutional screens for meritless defamation suits brought by public figures, which the West Virginia Supreme Court ignored. Those two screens are mutually reinforcing, and require (1) independent appellate review of the record, and (2) clear and convincing proof of actual malice. Petition for Certiorari ("Pet."), at 11-12. The West Virginia Supreme Court made no independent review of the record on which the trial court granted summary judgment to Petitioners. Instead, the court mandated a jury trial based on the mere fact—present in every summary judgment record—that the parties disagreed over the legal significance of undisputed facts.

Failure to correct that error at this stage will neuter the independent review requirement, reducing it to a toothless doctrine without a real world role. Moreover, if litigants' mere disagreement over the fairness of electoral advertisements is alone enough to secure a jury trial, then core political speech will be impermissibly chilled. Respondent's attempted defense of the West Virginia Supreme Court decision is insubstantial,[1] and denial of immediate review will undermine federal policy.

First, this Court has jurisdiction under 28 U.S.C. § 1257(a). Refusal to review the West Virginia Supreme Court decision before trial would "seriously erode [the] federal

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[1] Petitioners National Republican Senatorial Committee and the West Virginia State Victory Committee do not discuss Respondent's arguments directly solely to the separate petition filed by the Republican National Committee ("RNC") on March 7, 2002 (Docket No. 01-1328). Petitioners understand that the RNC intends to file its own Reply Brief to address those issues.

policy" of determining the proper scope of First Amendment protections for those engaged in core political speech.

Second, the West Virginia Supreme Court engaged in an empty exercise of articulating constitutional standards without acting upon them. The West Virginia court was required to conduct a "fresh examination of crucial facts" to determine if a jury could find clear and convincing evidence of actual malice. Pet. at 16-18. Instead, the court abdicated that responsibility, holding that the appellate role was satisfied—and that further factual review should be relinquished to the jury—so long as the parties disagreed about whether political speech was a product of actual malice. Independent review is rendered meaningless when, as here, the appellate court provides no clue about the facts considered sufficient to support a jury finding of actual malice.

Third, the West Virginia Supreme Court's failure to conduct a "fresh examination of crucial facts" simply masked Respondent's failure to proffer facts from which a jury could find clear and convincing evidence of actual malice. The record evidence on that issue is not "voluminous," Brief in Opposition ("Opp.") at i, but is vacuous, as the trial court held in granting summary judgment. Under this Court's precedents, the only evidence relevant to actual malice is the state of mind of the two individuals involved in creating and publishing the advertisements. Offering only mighty rhetoric, Respondent cannot show how a sharp debate over her legislative vote record amounts to proof from which a jury could find that Petitioners in fact knew that they had falsely described those votes.

I. THE WEST VIRGINIA SUPREME COURT'S DECISION IS "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

Under this Court's "pragmatic" approach, the state court judgment is "final" for purposes of 28 U.S.C. § 1257(a) jurisdiction. Pet. at 3-4; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). This case fits squarely within the fourth *Cox* category of judgments that are "final even though further proceedings are pending in the state courts." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-55 (1989); *Cox*, 420 U.S. at 476-87. Specifically, here:

> (1) "the party seeking review . . . might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and, (3) "refusal immediately to review the state-court decision might seriously erode federal policy . . . ."

Cox, 420 U.S. at 482-83; *accord Fort Wayne*, 489 U.S. at 55-56. Respondent's contention that the West Virginia Supreme Court's decision is not "final" merely because this case does not involve the constitutionality of a state statute or a media defendant, Opp. at 2-5, 8, thus has no basis in this Court's precedents.

First, Petitioners could prevail at trial on a non-federal ground if Respondents do not prove that the advertisements were false. Pet. App. 17a-19a; *see, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 516-17 (1991) (falsity an issue of state law). Such a finding would render unnecessary review of the federal issue of whether Respondent could establish actual malice by clear

and convincing evidence. *See Fort Wayne*, 489 U.S. at 56; *Cox*, 420 U.S. at 485.

Second, summary reversal by this Court, reinstating the trial court's summary judgment in favor of Petitioners, would terminate this litigation in its entirety. Pet. at 3-4; *see Cox*, 420 U.S. at 485-86 (review proper where reversal of state supreme court would result in "no trial at all").

Third, declining review at this stage will "seriously erode federal policy" because "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne*, 489 U.S. at 55 (and authorities cited therein). Independent review and the clear and convincing actual malice standard are rules of federal constitutional law, which ensure that the First Amendment is afforded sufficient breathing space to promote the robust and wide-open exchange of ideas that lies at the heart of our system of self-government. Pet. at 11-12, 28-29.

The West Virginia Supreme Court's published decision holding that a public-figure defamation plaintiff can survive summary judgment by merely "repeatedly and continuously" disputing the facts regarding actual malice, Pet. App. 15a, empties these constitutional requirements of all content. Pet. at 17-18. That harm is not "speculat[ive]," Opp. at 6, 29, but rather presents a real and present threat to First Amendment freedoms in political campaigns conducted in the State of West Virginia. Pet. at 4, 29-30; *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) ("[I]t would be intolerable to leave unanswered" a constitutional question that affects "upcoming ... elections"). A full-blown trial of insubstantial defamation claims can have as chilling an effect on free political debate as an adverse judgment itself. As this Court stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964):

> "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or the fear of expense of having to do so. They [will] tend to make only statements which 'steer far wider of the unlawful zone.'"

Id. at 279; Pet. at 29.

II. THE WEST VIRGINIA SUPREME COURT FAILED TO CONDUCT THE CONSTITUTIONALLY REQUIRED "FRESH EXAMINATION OF CRUCIAL FACTS."

Respondent does not dispute that: (1) as a matter of federal constitutional law, an appellate court reviewing a grant of summary judgment must conduct a "*fresh examination of crucial facts*" for clear and convincing evidence of actual malice, Pet. at 11, 13-18 (citing, *inter alia*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (emphasis added)); and, (2) the West Virginia Supreme Court failed to mention any fact—as opposed to the parties' disagreement about the record—from which a jury could find actual malice by clear and convincing evidence. *Id.* These concessions alone warrant error correction in the form of summary reversal because the West Virginia Supreme Court's decision is a "demonstrably erroneous" application of federal law. *Id.* at 12-18; *see also, e.g.*, *United States v. Bass*, 122 S. Ct. 2389, 2389 (2002) (*per curiam*) (summary reversal warranted where lower court decision was "contrary to" this Court's precedent and "threaten[ed]" a "constitutional function" of the executive).

Independent review is more than an empty slogan, and requires actual effort by an appellate court to search the record and identify the facts that would sustain a jury finding

of actual malice. Pet. at 11, 13-18. It was therefore inadequate for the West Virginia Supreme Court merely to mouth the words "review *de novo*," "plenary review," and "upon a review of the record." Pet. App. 9a, 15a; Opp. at 19-20. Confining itself to that boilerplate litany of summary judgment standards, the West Virginia Supreme Court did not even recite the rule of independent review,[2] let alone apply it. This Court has made clear that "the state courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 499 (1993) (O'Connor, J., dissenting); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (*per curiam*) (summary reversal appropriate where lower court "recited" the relevant legal standard, but failed to apply it).

This Court—and all of the federal Circuit Courts of Appeals that have addressed the issue on appeals from a grant of summary judgment—have applied the rule of independent review by discussing whether the facts proffered by the public-figure plaintiff could meet the constitutional threshold of clear and convincing evidence of actual malice. Pet. at 16-18 & nn.10-11. The West Virginia Supreme Court stands alone in its striking departure from these clear precedents: There is *no* published decision from the federal courts in which a public-figure defamation case is remanded for trial without any discussion whatsoever of the evidence regarding actual malice.

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[2] Mimicking the West Virginia Supreme Court, Respondent also does not cite or discuss the rule of independent review set out in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984), or in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) and *New York Times Co*, 376 U.S. 254—two cases that Respondent highlights. Opp. at 14.

Respondent glosses over the West Virginia Supreme Court's extraordinary decision, casually stating that the court met its constitutional obligation of independent review because it "recite[d] certain evidence taken from the record." Opp. at 20. To the contrary, the only "evidence" cited by the West Virginia Supreme Court concerned the exclusion of unspecified "deposition testimony," Pet. App. 16a n.10; Pet. at 18 n.12, which addressed falsity, not actual malice. *Compare* Pet. App. 16a n.10 (criticizing trial court for excluding portions of Respondent's evidence) *with id.* at 27a (excluding Respondent's "only record evidence concerning *falsity* . . . ." (emphasis added)).

III. THE RECORD CONTAINS *NO* EVIDENCE OF ACTUAL MALICE.

Bravado aside, Respondent cannot seriously suggest that there is a "voluminous record" on the issue of actual malice. Opp. at i. The standard is a subjective one, focusing on the state of mind of those responsible for publishing the allegedly defamatory statements. Pet. at 18-19. The relevant question is whether Respondent proffered clear and convincing evidence that Petitioners "had a *high degree of awareness* of . . . probably falsity" or "*in fact* entertained serious doubts as to the truth of [the] publication." *Harte-Hanks*, 491 U.S. at 688 (emphasis added) (internal quotations omitted); Pet. at 19. Respondent made no such showing below, and fails again to do so here.

Only two individuals were materially involved in creating and publishing the advertisements at issue: Craig Engle (who was responsible for reviewing and approving the advertisements) and David Welch (the consultant who drafted the advertisements for Petitioners' review and approval). Pet. at 7-8, 19-29. This record contains *no evidence*—let alone the constitutionally required clear and convincing evidence—that either Mr. Engle or Mr. Welch acted with actual malice. *Id.*

Respondent did not even take Mr. Engle's deposition, let alone contradict his affidavit testimony describing the process by which he verified and approved the factual statements in the advertisements. Pet. at 27-29. As a matter of law, Respondent's defamation claim fails for this reason alone because it is axiomatic that "the state of mind required for actual malice [has] to be brought home to the persons *in the [Petitioners'] organization having responsibility for the publication of the advertisement.*" *New York Times Co.*, 376 U.S. at 287 (emphasis added); Pet. at 27-28 & n.15 (additional authorities cited therein).

Undeterred, Respondent offers three wisps of actual malice "proof" involving Mr. Welch, Opp. at 29-30, none of which can survive even a mild breeze, let alone a searching, independent review of the record. It is poignant that, in offering those three items, Respondent discusses more of the record than was ever mentioned by the West Virginia Supreme Court. All three items are legally insufficient evidence of actual malice, and one of them—the ostensible use of just "part" of Respondent's voting record—confirms that Respondent seeks at trial, not to prove actual malice, but to extend her political campaign, hoping to sway jurors by presenting to them other "parts" of her voting record.[3]

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[3] The other two are Petitioners' alleged "pattern of deception" and the refusal to terminate the advertisements at the request of Respondent's opponent. Opp. at 29. The first has nothing to do with Mr. Welch's state of mind regarding his interpretation of Respondent's voting record. By Respondent's own account, that purported "pattern" either dealt with Mr. Welch's alleged statements regarding the funding of the advertisements or the alleged falsity of the advertisements. *Id.* at 12-13. Equally, the fact that Respondent's opponent asked Petitioners to "consider" terminating the advertisements, *id.* at 29, is immaterial to actual malice because Respondent does not dispute that her opponent: (1) merely objected to the "tone" of the advertisements; (2) never informed (continued...)

Respondent apparently believes that there was more to her voting record than Petitioners chose to include in the advertisements. But Respondent cannot dispute either (1) that the advertisements truthfully discussed the votes on which they focused, or (2) that Mr. Welch in fact believed that those votes were relevant to Respondent's fitness for office. Pet. at 19-29.

It is undisputed that Mr. Welch in fact believed that "[a] voting record is a voting record is a voting record. . . . [A] legislator must be held accountable for all of [her] votes." Welch Depo., at 48, 49, 50; Pet. at 25. Respondent's exaggerated claims of "distortion," "deception," "character assassination," and "fabrication," Opp. at 12-13, 17, 24, 29, reflect nothing more than her disagreement with Mr. Welch's characterization of her "true" voting record. That disagreement is precisely what political debate is all about, and does not amount to clear and convincing evidence of actual malice. *See Harte-Hanks*, 491 U.S. at 665, 666 (motive to promote one candidate over another insufficient proof of actual malice; "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) ("[D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.").[4]

Petitioners that the advertisements were false; (3) never asked that the advertisements be withdrawn because they were false; (4) played no role whatsoever in the preparation of the advertisements; (5) did not even know that Petitioner Victory Committee existed; and, (6) did not personally review Respondent's legislative voting record. Pet. at 19-20 n.13.

[4] Far from being "parallel" to this case, Opp. at 28, *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674 (W. Va.), *cert denied*, 423 (continued...)

CONCLUSION

For the foregoing reasons, and those stated in the Petition, a writ of certiorari should issue summarily reversing the judgment of the West Virginia Supreme Court.

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July 24, 2002

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U.S. 882 (1975), simply confirms that the West Virginia Supreme Court did not fulfill its constitutional obligation of independent review and that Respondent flunks the actual malice test. There, after exhaustively reviewing the facts regarding actual malice, the *Sprouse* court concluded that the defendant newspaper in fact was aware that the published statements were false. *Id.* at 685 ("no evidence" that defendant "had reason to believe" that plaintiff was engaged fraud); *id.* at 686 (defendant knew "for an absolute certainty" that plaintiff's business was legitimate, rather than a "dummy firm"); *id.* at 688 (information gathered by defendant contained "no facts" or "no evidence" indicating that plaintiff had engaged in improper business transactions). *Sprouse*, in any event, is not binding on this Court.